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Torts: Praying for the Parish or Preying on the Parish? Clergy Sexual Misconduct and the Tort of Clergy Malpractice

I. Introduction

Clergy sexual misconduct, from child abuse¹ to parishioner² affairs,³ permeates society, affecting nearly every religious institution.⁴ Incidents of clergy sexual abuse have been reported in more than thirty-five states,⁵ impacting congregations and congregants alike. The tort remedies currently available for clergy sexual abuse are limited to battery, negligent or intentional infliction of emotional distress, breach of fiduciary duty, respondeat superior, and negligent hiring and supervision. These torts are often difficult to prove or are not fully accepted by many courts. Introducing the tort of clergy malpractice would provide victims of clergy sexual abuse a more feasible remedy to recover for their emotional and physical losses.

To date, no U.S. court has accepted clergy malpractice as a viable tort⁶ for fear of problems with excessive governmental entanglement with religion or difficulty in defining an appropriate standard of care.⁷ Such fears are unwarranted because developing clergy malpractice does not require judicial activism and will not excessively entangle the government in defining religious doctrine. Instead, courts may look to secular documents adopted by the church regarding personnel policies to define the standard of care. By looking to wholly secular documents, a court need only interpret the reasonableness of the policy, not the religious doctrine itself. With the

1. See INVESTIGATIVE STAFF OF THE BOSTON GLOBE, BETRAYAL: THE CRISES IN THE CATHOLIC CHURCH (2002) [hereinafter BETRAYAL] (detailing accounts of sexual abuse of minors by Catholic clergy in the Boston diocese).

2. For the purposes of this comment the terms, "parish" and "congregation" are used interchangeably to indicate church members as a group; while "parishioner" and "congregant" are used to indicate an individual church member even though different religions refer to their church members with different terms.

3. See ANNIE LAURIE GAYLOR, BETRAYAL OF TRUST: CLERGY ABUSE OF CHILDREN (1988), available at <http://www.ffrf.org/betrayaloftrust.html> (last visited June 16, 2004) (explaining that clergy abuse comes in many forms, including rape, sexual harassment and exploitation, and spousal abuse).

4. See *infra* notes 20-26 and accompanying text.

5. Associated Press, *Catholic Church Abuse State-by-State*, TULSA WORLD, Apr. 28, 2002, at A10 [hereinafter *State-by-State*].

6. *Dausch v. Rykse*, 52 F.3d 1425, 1432 (7th Cir. 1994).

7. *Enderle v. Trautmann*, No. CIV. 13-01-22, 2001 WL 1820145, at *4 (D.N.D. Dec. 3, 2001).

enormous scandal facing the United States today, courts must look closer at the detrimental effects of clergy malpractice to realize that the benefits of allowing a tort of clergy malpractice outweigh the fears.

This comment examines the importance of adding clergy malpractice to the torts available to protect victims and to provide compensation for their losses.⁸ To better understand why the tort of clergy malpractice is necessary, it is imperative to discuss the current climate and scope of the sexual abuse crisis. Part II explains the scope of the sexual abuse crisis in the United States, specifically examining the current media coverage, the church's response, and the layperson response. Part III details the current tort remedies for victims of clergy sexual misconduct. This part discusses battery, negligent or intentional infliction of emotional distress, breach of fiduciary duty, respondeat superior, and negligent hiring and supervision, specifically examining the acceptance and rejection of each tort in its application. Part IV defines clergy malpractice. Part IV.A provides a history of clergy malpractice. Part IV.B provides the clergy malpractice definition proposed by this comment. Part IV.C details the duties and responsibilities of the clergy necessary to establish the foundation for clergy malpractice and the various standards of care. Parts IV.D and IV.E examine the problems with clergy malpractice and offer solutions to avoid these problems. Part V illustrates the proper application of clergy malpractice necessary to persuade the courts to allow for this tort by demonstrating the reasons behind accepting the tort of clergy malpractice and offering a hypothetical application to the current sexual abuse crisis in the Catholic Church.

II. Understanding the Scope of the Sexual Abuse Crisis in the United States

Sexual abuse by clergymen is not an uncommon problem. In fact, the statistics are startling. "[O]ne in every four clergymen has had some form of sexual contact with a parishioner and one out of ten has had an affair."⁹ A 1997 British study of the Church of England found that 67% of survey respondents knew a colleague who engaged in inappropriate sexual conduct with a parishioner.¹⁰ In another survey, between 10% and 38% of all clerical respondents reported some level of sexual contact with a parishioner.¹¹

8. For the purposes of this comment, the recent sexual abuse scandal of the Catholic Church will be used to illustrate the viability of the clergy malpractice tort.

9. John H. Arnold, *Clergy Sexual Malpractice*, 8 U. FLA. J.L. & PUB. POL'Y 25, 26 (1996).

10. Thaddeus Birchard, *Clergy Sexual Misconduct: Frequency and Causation*, 15 SEXUAL & RELATIONSHIP THERAPY 127, 135 (2000).

11. Janice D. Villiers, *Clergy Malpractice Revisited: Liability for Sexual Misconduct in the Counseling Relationship*, 74 DENV. U. L. REV. 1, 14 n.87 (1996).

According to *The Christian Science Monitor*, at least seventy-five clerics have been convicted of child sexual abuse since 1985.¹² An April 2002 survey conducted by the Center for the Prevention of Sexual and Domestic Violence in Seattle found that in 1993, 70% of Southern Baptist ministers knew of other ministers who had sexual contact with a parishioner.¹³ A recent survey conducted by the Associated Press found that churches removed more than 200 priests from their church duties since January 2002, and during that time period victims filed at least 300 civil suits alleging sexual misconduct.¹⁴ The *Dallas Morning News* reported that “60[%] or more of U.S. bishops have been accused of failing to stop sexual abuse or covering up past crimes.”¹⁵ In England, the Roman Catholic Church has apologized for its handling of pedophile clerics in England and Wales after a former priest was sentenced to five years for assaulting children and the BBC reported that the church failed to act in a number of suspected abuse cases.¹⁶ The clergy sexual misconduct scandal reaches as far as Australia¹⁷ and South America.¹⁸ As these statistics make clear, sexual relationships between clergymen and their parishioners are a problem — one that is receiving increased and highly publicized media coverage.

Although much of the sexual abuse scandal has surrounded the Roman Catholic Church,¹⁹ other religions have faced sexual abuse problems in the past. In 1992, the Presbyterian Church U.S.A. estimated that 10% to 23% of its clergy had participated in “inappropriate sexual behavior or . . . contact.”²⁰ In November 2002, a prominent New York Presbyterian minister who had served the church for more than thirty years left the ministry after facing charges that he sexually abused adolescent boys.²¹ In the last fifteen years,

12. Gayle White, *Sexual Misconduct: Keeping Vigil: How Various Faiths Protect the Innocent in Their Flocks*, ATLANTA J. & CONST., Sept. 14, 2002, at B1.

13. *Id.*

14. Bob von Sternberg, *Insurance Falls Short in Church Abuse Cases; Catholic Dioceses are Forced to Find Other Sources to Pay Settlements*, STAR TRIBUNE (Minneapolis, Minn.), July 27, 2002, at A1.

15. Terry Mattingly, *Zero Tolerance? What About the Bishops? Now . . . About the Bishops*, TOPEKA CAPITAL-JOURNAL, July 27, 2002, at E1.

16. Warren Hoge, *British Cardinal Apologizes for Ignoring Warnings About a Pedophile Priest*, N.Y. TIMES, Nov. 21, 2002, at A10.

17. Jeremy Calvert, *Critics Shut out of Pell Inquiry*, HERALD SUN (Melbourne), Oct. 1, 2002, at 9.

18. *Signs of the Times: Clergy Abuse Cases Becoming Public in South America*, AMERICA, Nov. 11, 2002, at 4.

19. BETRAYAL, *supra* note 1.

20. James T. O'Reilly & Joann M. Strasser, *Clergy Sexual Misconduct: Confronting the Difficult Constitutional and Institutional Liability Issues*, 7 ST. THOMAS L. REV. 31, 34 (1994).

21. Lisa W. Foderaro, *Minister Quits After Allegations of Abuse*, N.Y. TIMES, Nov. 16,

four American rabbis have lost their positions because of sexual contact with parishioners.²² In 1990, the United Methodist Church reported that nearly 23% of laywomen reported being sexually harassed by either their pastor or another minister.²³ Additionally, Buddhist teachers were accused of sexual misconduct.²⁴ A survey of evangelical ministers reported that "23% admitted to engaging in sexually inappropriate conduct, and 12% admitted to having sexual intercourse" with a parishioner.²⁵

This comment, however, will focus on the Roman Catholic Church's response and how the tort of clergy malpractice could easily apply to the existing situation. Recent media coverage illustrates the pervasiveness of the sexual abuse scandal within the Roman Catholic Church. Cities across the country have reported cases of sexual abuse by current and former Catholic clergy. *The Boston Globe's* investigative staff compiled information about the scandal in the Boston diocese and published a book detailing the scandal.²⁶ Indeed, newspapers in twenty-seven states have reported incidents of sexual misconduct by clergy or response to the clergy misconduct scandal,²⁷ and the

2002, at B5.

22. O'Reilly & Strasser, *supra* note 20, at 34.

23. *Id.*

24. *Id.*

25. *Id.* at 34-35.

26. BETRAYAL, *supra* note 1.

27. See Associated Press, *Downstate Priest Takes Leave as Abuse Case Reopens*, CHI. TRIB., Sept. 22, 2002, at C5; *Attorney Picked to Investigate Clergy Misconduct Allegations*, MILWAUKEE J. SENTINEL, July 12, 2002, at 9B; Ziva Branstetter, *Diocese OK'd Prior Settlements*, TULSA WORLD, Aug. 7, 2002, at A1; *Chronology*, PORTLAND PRESS HERALD, Sept. 19, 2002, at 5A; Mike Chalmers, *Church Board Faces Criticism*, NEWS J. (Wilmington, Del.), Sept. 23, 2002, at 1A; Virginia de Leon, *Catholics Unite Amid Scandal; Parishioners Want Accountability, Aid for Victims*, SPOKESMAN-REV. (Spokane, Wash.), Dec. 3, 2002, at B1; Richard C. Dujardin, *Local Priests Say Crisis Not Keeping Believers Away*, PROVIDENCE J.-BULL., Dec. 15, 2002, at A25; Michael Fisher, *Two Sisters Allege Abuse by Priest*, PRESS-ENTERPRISE (Riverside, Cal.), Sept. 20, 2002, at B9; Krista Gustafson, *Bishop Releases Sex Misconduct Policy for Diocese*, ST. CLOUD TIMES (St. Cloud, Minn.), July 2, 2003, at B1; Bonnie Harris & Judith Cebula, *Priest Quits, Admits Past Misconduct*, INDIANAPOLIS STAR, Sept. 6, 2002, at 1A; Bill Hart & Joseph A. Reave, *Romley Calls Diocese Slow in Inquiry*, ARIZ. REPUBLIC, Sept. 25, 2002, at B1; Ron Howell, *Mending Old Wounds; In Brooklyn, Clergy Abuse Survivors Use Talk Therapy to Heal*, NEWSDAY (New York, N.Y.), Dec. 15, 2002, at A8; Timothy Hurley, *Banished Priest to Leave Ministry*, HONOLULU ADVERTISER, May 22, 2003 at B2; Kim Kozlowski, *2 Priests Guilty in Abuse Cases*, DETROIT NEWS, Dec. 19, 2002, at 1D; William R. Levesque, *Memo Warned Priest Against Meeting Kids*, ST. PETERSBURG TIMES, Sept. 13, 2002, at B1; Paul Logan, *N.M. Church Leaders Say They Kept Abusers on Board*, ALBUQUERQUE J., June 16, 2002, at B1; Kathryn Marchocki, *Lawyer: Bishop's Actions Key in Scandal*, UNION LEADER (Manchester, N.H.), Sept. 20, 2002, at B3; Terry Mattingly, *Baptists' Tradition Make It Hard to Oust Sex-Abusing Clergy*, KNOXVILLE NEWS-SENTINEL, June 22, 2002, at C2; Joseph Morton, *Abuse Lawsuits Settled, Mediator Helps with Negotiations*,

Associated Press has reported incidents of sexual misconduct by clergy in more than thirty-five states.²⁸

A. The Roman Catholic Church's Response to the Crisis

Within the last fifteen years, the Catholic Church has focused its attention on clergy sexual abuse against minors, trying to provide justice and healing to victims while also providing redemption and assistance to offenders.²⁹ The United States Conference of Catholic Bishops (USCCB) is the hierarchical assembly of bishops in the United States that promulgates the rules for each diocese.³⁰ The USCCB's purpose and function under civil law is "[t]o unify, coordinate, encourage, promote and carry on Catholic activities in the United States."³¹ As the governing body of American Catholic Bishops, the USCCB offers assistance to dioceses regarding their policies.³²

Most religious denominations have addressed the problem of sexual abuse and exploitation and have adopted a policy on sexual abuse by their clergy.³³ The United Methodist Church, the Baptist Convention, the Episcopalian Church, the African Methodist Church, the Presbyterian Church, the Assembly of God, and the Church of Jesus Christ of Latter-day Saints have written policies regarding sexual misconduct that require them to report sexual misconduct to the proper authorities.³⁴

The Catholic Church's response to sexual misconduct has spanned fifteen years of varying policy. In 1982, the USCCB received its first question

OMAHA WORLD-HERALD, Aug. 23, 2002, at B1; Norm Parish, *Area Priest in Sex Case Is Laicized by Pope*, ST. LOUIS POST-DISPATCH, Aug. 8, 2002, at B4; Shirley Ragsdale, *Diocese Faces 4th Abuse Lawsuit*, DES MOINES REGISTER, Sept. 19, 2003 at B1; Peter Smith, *Suits Accusing Dead Priests Raise Tough Issues for Church, Families*, COURIER J. (Louisville, Ky.), Sept. 2, 2002, at 1A; Staff, *Pastor in Roanoke Accused of Sex Abuse; He Is Suspended Pending Outcome of Church Investigation*, VIRGINIAN-PILOT, Aug. 27, 2002, at A1; Staff, *Dallas Priest Still on Job Despite Claims of Abuse*, HOUSTON CHRON., Nov. 12, 2002, at A16; Nicole Tsong, *Seven Priests Abused Children*, ANCHORAGE DAILY NEWS, Oct. 30, 2003, at A1; von Sternberg, *supra* note 14, at A1; Heather Wecsler, *Diocese Starts Healing Process*, NEWS-STAR (Monroe, La.), June 20, 2002, at 3A; Ann Wlazelek, *Allentown Priest Will Give Up Post Pending Review*, MORNING CALL (Allentown, Pa.), Sept. 12, 2002, at B1.

28. *State-by-State*, *supra* note 5, at A10.

29. United States Conference of Catholic Bishops, *Efforts to Combat Clergy Sexual Abuse Against Minors: A Chronology*, at <http://www.nccbuscc.org/comm/kit2.htm> (last visited July 12, 2004) [hereinafter *Catholic Bishops, Efforts to Combat Clergy Sexual Abuse*].

30. United States Conference of Catholic Bishops, *Who We Are*, at <http://www.nccbuscc.org/ocyp/whoweare.htm> (last visited July 11, 2004).

31. *Id.*

32. *Id.*

33. White, *supra* note 12, at B1.

34. *Id.*

regarding liability for sexual molestation by clergy members.³⁵ Within three years, the USCCB and several state conferences began developing personnel policies regarding sexual abuse and misconduct.³⁶ The initial policy suggested removal of the offender, referral of the offender for professional medical evaluation, prompt offering of solace and support to the victim, protection of confidentiality, and compliance with civil law obligations.³⁷ Throughout the 1990s, the Catholic bishops developed policies regarding the sexual abuse of minors, but in June 2002, the USCCB developed the leading document on how to handle sexual abuse of minors within the Catholic Church.³⁸ At the 2002 annual conference in Dallas, Texas, the U.S. Catholic Bishops developed the most comprehensive sexual abuse policy to date — the *Charter for the Protection of Children & Young People* (the Charter)³⁹ — and established the National Review Board to assess the Church's progress.⁴⁰ The Charter garnered much praise for its zero-tolerance stance on sexual misconduct by the clergy, yet the Vatican made several changes before officially approving the Charter.⁴¹ A committee of Vatican officials and American bishops altered the Charter by reforming the policy to provide more due process rights to the accused cleric.⁴²

The Charter adopted the words of Pope John Paul II, stating that “sexual abuse of young people is ‘by every standard wrong and rightly considered a crime by society; it is also an appalling sin in the eyes of God.’”⁴³ The Charter defines sexual abuse to include “contacts or interactions between a child and an adult when the child is being used as an object of sexual gratification for the adult”⁴⁴ and provides a detailed policy of response with an emphasis on reaching out to the victims.⁴⁵

35. Catholic Bishops, *Efforts to Combat Clergy Sexual Abuse*, *supra* note 29.

36. *Id.*

37. *Id.*

38. *Id.*

39. UNITED STATES CONFERENCE OF CATHOLIC BISHOPS, CHARTER FOR THE PROTECTION OF CHILDREN & YOUNG PEOPLE (2002), available at http://www.usccb.uscc.org/bishops/charter_final.pdf [hereinafter CHARTER].

40. Catholic Bishops, *Efforts to Combat Clergy Sexual Abuse*, *supra* note 29.

41. Editorial, *The Bishops and Zero Tolerance*, N.Y. TIMES, Nov. 15, 2002, at A30.

42. See Frank Bruni & Laurie Goodstein, *Panel of Bishops Completes Changes to Zero-Tolerance Policy*, N.Y. TIMES, Oct. 31, 2002, at A18; Laurie Goodstein, *Bishops Pass Plan to Form Tribunals in Sex Abuse Cases*, N.Y. TIMES, Nov. 14, 2002, at A1.

43. CHARTER, *supra* note 39, at 2.

44. *Id.* at 5 n.*.

45. *Id.* at 5.

The Charter requires that each diocese extend its commitment to the victims by providing counseling, spiritual guidance, and support groups.⁴⁶ Each diocese must establish its own review board to assess the merits of sexual misconduct charges and fully investigate such charges.⁴⁷ Moreover, no diocese may enter into a confidentiality agreement, except for special circumstances brought by the victim.⁴⁸ The document further emphasizes that the diocese should cooperate with public authorities.⁴⁹ Additionally, the Charter permits a diocese to remove a priest or deacon from his clerical duties during a preliminary investigation.⁵⁰ If a cleric admits to engaging in sexual abuse or an appropriate investigation establishes sexual abuse, the Church will promptly and permanently remove the offender, or if removal is not applicable (because of age or infirmity), the offender must lead a life of prayer and cannot “celebrate Mass publicly,” “wear clerical garb,” or “present himself publicly as a priest.”⁵¹

Additionally, the Charter establishes an Office for Child and Youth Protection at the USCCB’s national headquarters and a National Review Board of laypersons to assist the office and monitor the application of the Charter.⁵² The National Review Board was originally chaired by the Honorable Frank Keating, the former governor of Oklahoma,⁵³ and consists of eleven additional Catholic laypersons.⁵⁴ The Charter, the Office for Child and Youth Protection, and the National Review Board create the framework for handling sexual abuse cases in the Catholic Church.⁵⁵

46. *Id.*

47. *Id.* at 6.

48. *Id.*

49. *Id.* at 7.

50. *Id.*

51. *Id.* at 8.

52. *Id.* at 10.

53. United States Conference of Catholic Bishops, *Governor Frank Keating of Oklahoma to Chair American Bishops’ Advisory Panel for New National Office for Child and Youth Protection*, available at <http://www.nccbuscc.org/comm/archives/2002/02-112.htm> (last visited June 14, 2002). On June 17, 2003, Frank Keating resigned from his position as chair of the advisory panel amidst objections for publicly criticizing several church leaders. Jim Myers, *Keating’s Letter Offers No Apology*, TULSA WORLD, June 17, 2003, at A1.

54. United States Conference of Catholic Bishops, *Membership of National Review Board Announced*, at <http://www.nccbuscc.org/comm/archives/2002/02-147.htm> (last visited July 15, 2004). The other eleven board members are: Robert S. Bennett, Anne M. Burke, Michael J. Bland, William R. Burleigh, Nicholas P. Cafardi, Jane Chiles, Alice Bourke Hayes, Pamela D. Hayes, Paul R. McHugh, M.D., Leon E. Panetta, and Ray H. Siegfried, II. *Id.*

55. In January 2004, the United States Conference of Catholic Bishops released an audit of the implementation of the Charter. United States Conference of Catholic Bishops, *Executive Summary, Compliance Audits, Analysis of the Findings, and Recommendations*, at <http://www.nccbuscc.org/ocyp/audit2003/sectionone.htm> (last visited Jan. 11, 2004); see also

In December 2002, the Bishops established and approved the policy when assessing an allegation of sexual abuse of a minor by incorporating the Charter and Canon law into *Essential Norms for Diocesan/Eparchial Policies Dealing with Allegations of Sexual Abuse of Minors by Priests or Deacons* (the Norms), which is binding on all American dioceses.⁵⁶ The Norms require that each diocese must have a “written policy on the sexual abuse of minors by priests and deacons” and must “designate a competent person to coordinate assistance” for victims.⁵⁷ Additionally, the Norms call for a review board to process allegations, which must consist of at least five people, including one priest and one person experienced in the treatment of sexually abused minors.⁵⁸

In addition to establishing the written policy requirement and the review board, the Norms establish the due process necessary for an allegation.⁵⁹ The Norms create the appropriate steps in an investigation, which include limiting duties or removal, but also encourages the accused to retain counsel to provide an opportunity to be heard.⁶⁰ The new policy attempts to safeguard both the accused and the victim’s rights in a dispute.

B. The Layperson Response to the Crisis

In the wake of the Catholic Church’s sexual abuse scandal, laypeople have rallied together for support and to effectuate change within the church.

Laurie Goodstein, *Dioceses Are Moving Ahead on Abuse, Audit Finds*, N.Y. TIMES, Jan. 7, 2004, at A14; Patrick Healy, *Clerics’ Sex Abuse Victims Say Lay Boards Ignore Them*, N.Y. TIMES, Jan. 6, 2004, at B5. The auditor’s report found that the dioceses are the beginning of implementing the new process. The audit found “all dioceses and eparchies to be compliant with some or all of the articles of the *Charter*.” *Id.* The audit focused on each diocese and provided a comprehensive analysis of the implementation in that diocese. *Id.* According to the report on the Archdiocese of Oklahoma City, “[a]t the conclusion of this audit, the Archdiocese of Oklahoma City was found to be compliant with the provisions of the *Charter*.” United States Conference of Catholic Bishops, *Archdiocese of Oklahoma City*, at <http://www.nccbuscc.org/ocyp/audit2003/oklahomacityok.htm> (last visited Jan. 11, 2004). At the conclusion of the audit of the Tulsa Diocese, that diocese was issued one recommendation to “submit criminal background requests on all active clergy to the Oklahoma State Bureau of Investigation.” United States Conference of Catholic Bishops, *Archdiocese of Tulsa*, at <http://www.nccbuscc.org/ocyp/audit2003/tulsaok.htm> (last visited Jan. 11, 2004).

56. United States Conference of Catholic Bishops, *Essential Norms for Diocesan/Eparchial Policies Dealing with Allegations of Sexual Abuse of Minors by Priests or Deacons*, at <http://www.usccb.org/bishops/norms.htm> (last visited June 20, 2004) [hereinafter Catholic Bishops, *Norms*].

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

Although there have been clergy sexual abuse support organizations for nearly a decade,⁶¹ the Catholic Church has increasingly recognized their presence and their ability to influence the Catholic community.⁶² For more than a decade, The Linkup,⁶³ with help from its 5000 members, has assisted victims and survivors of clergy sexual abuse and has helped establish accountability in churches and other religious institutions.⁶⁴

In 1992, former victims of sexual abuse and misconduct by clergy formed the Survivors Network of those Abused by Priests (SNAP) to help men and women who were sexually abused by spiritual leaders.⁶⁵ An all-volunteer group, SNAP maintains an active online self-help discussion arena and provides local chapter meetings.⁶⁶ In addition to providing support for victims and survivors of sexual abuse, SNAP works for change by lobbying Catholic dioceses and state legislatures to increase punishment for offending priests.⁶⁷

Voice of the Faithful,⁶⁸ the most recently formed survivor group, began in January 2002 with twenty-five people gathered in a small church in Massachusetts and has grown to a membership of over 25,000 people.⁶⁹ This group's main goal is to effectuate change by supporting survivors and priests of integrity and by encouraging structural change within the Church.⁷⁰ Specifically, Voice of the Faithful plans to assess the Bishops' and dioceses' compliance with the Church's new policies on sexual abuse by offering a report card on each diocese.⁷¹ In fact, Voice of the Faithful's criticism of the handling of the abuse scandal and its outcry for change within the church garnered a meeting with Boston Archdiocese Cardinal Bernard Law.⁷²

61. See, e.g., The Linkup — Survivors of Clergy Abuse, at <http://www.thelinkup.org> (last visited June 20, 2004).

62. See *infra* note 72 and accompanying text.

63. See, e.g., The Linkup — Survivors of Clergy Abuse, at <http://www.thelinkup.org> (last visited June 20, 2004).

64. The Linkup — Survivors of Clergy Abuse, *Our Mission*, at <http://www.thelinkup.com/mission.html> (last visited June 20, 2004).

65. See SNAP (Survivors Network for those Abused by Priests), at <http://www.survivorsnetwork.org> (last visited July 15, 2004).

66. *Id.*

67. Laurie Goodstein, *Victims' Group Uses Spotlight to Seek Changes in Law*, N.Y. TIMES, May 10, 2002, at A28.

68. See Voice of the Faithful, at <http://www.votf.org> (last visited July 15, 2004).

69. *Id.*

70. Voice of the Faithful, *Our Mission Statement*, at http://www.votf.org/Who_We_Are/mision.html (last visited July 15, 2004).

71. Michael Paulson, *Catholic Group to Rate Bishops*, BOSTON GLOBE, July 20, 2002, at A1.

72. Pam Belluck, *Group Formed Over Scandal Wins Meeting with Cardinal*, N.Y. TIMES, Oct. 30, 2002, at A25. Additionally, Voice of the Faithful requested Cardinal Law's resignation

Because public outrage concerning the sexual abuse scandals is increasing, the need for a remedy for victims and survivors of clergy sexual abuse is more apparent. The response within the community echoes the need to reassess current tort law to determine the best remedy for clergy misconduct.

III. Current Theories of Civil Liability in Clergy Sexual Misconduct Cases

Currently, tort actions against an offending cleric and his church are limited by the available causes of action. To recover for inappropriate sexual misconduct, most survivors file claims of battery, intentional or negligent infliction of emotional distress, breach of fiduciary duty, respondeat superior, or negligent hiring and supervision.⁷³ Courts have both accepted and rejected these causes of action with little consistency, leaving survivors with more questions than answers.

A. Battery

Sexual misconduct is an unwanted touching,⁷⁴ and the actual act of touching in clergy sexual misconduct often falls within the tort of battery. Civil battery liability requires that the accused act "intending to cause a harmful or offensive contact" with the person and the harmful contact "directly or indirectly results."⁷⁵ In many sexual misconduct cases, the elements necessary to prove battery are present.⁷⁶

Importantly, battery does not evoke questions regarding First Amendment protection.⁷⁷ Therefore, this tort presents an opportunity to seek civil damages from the cleric for sexual misconduct. However, the elements for establishing battery limit the scope of recovery to only the actual offender.⁷⁸ Indeed, battery cannot apply to the church or any supervisor who knew of the abuse

as Cardinal of the Archdiocese of Boston, which later occurred in December 2002. See Pam Belluck & Frank Bruni, *Scandals in the Church: The Overview; Law, Citing Abuse Scandal, Quits as Boston Archbishop and Asks for Forgiveness*, N.Y. TIMES, Dec. 14, 2002, at A1.

73. O'Reilly & Strasser, *supra* note 20, at 39-59.

74. Battery is defined as "[t]he application of force to another, resulting in harmful or offensive contact." BLACK'S LAW DICTIONARY 146 (7th ed. 1999).

75. RESTATEMENT (SECOND) OF TORTS § 13 (1965).

76. Gagne v. O'Donoghue, No. CA 941158, 1996 WL 1185145 (Mass. Super. Ct. June 26, 1996) (involving a count of sexual assault and battery relating to physical, sexual, and emotional abuse of an altar boy by a priest).

77. John Trevor Wood, Note, *Causes of Action in Missouri Against the Church and Clergy for Sexual Misconduct* in Gibson v. Brewer, 65 UMKC L. REV. 1027, 1031 (1997).

78. In order to prove battery, the court must find that the accused intended to cause the harmful or offensive contact and that contact actually occurred. This would likely only be possible in cases against the offending cleric because he made contact, not a higher church official.

or who knowingly concealed it because these actions fail to satisfy the elements of battery. This important limitation to battery make it the tort useful, but not comprehensive.

B. Negligent or Intentional Infliction of Emotional Distress

Many victims, when faced with sexual misconduct or abuse, suffer from emotional distress in the form of Post-traumatic Stress Syndrome.⁷⁹ Symptoms include “depression, suicidal tendencies, self-mutilation,” anxiety, sexual dysfunction, flashbacks, and addictive behavior.⁸⁰ The damage to a victim’s mental state continues long after the abuse, as many victims repress their memories for many years or are afraid to discuss their abuse and are unable to confide even in close friends, siblings, or spouses.⁸¹

The tort of intentional infliction of emotional distress occurs when “[o]ne who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another” and bodily harm results from the actions.⁸² In comparison, negligent infliction of emotional distress occurs when the actor “intentionally and unreasonably subjects another to emotional distress which he should recognize as likely to result in illness or other bodily harm.”⁸³ The actor is subject to liability even if he did not intend to inflict the harm.⁸⁴

Sexual misconduct by clergy seems to fall within the definition of either negligent or intentional infliction of emotional distress; however, courts have not readily accepted the application of these torts.⁸⁵ Courts and juries alike have been reluctant to accept clerical misconduct claims because of the difficulty in weighing outrageous conduct and the fear of infringing upon religious doctrine.⁸⁶ In the context of sexual misconduct, emotional distress might be easier to prove, but courts nevertheless remain leery of extending this tort. In fact, courts have refused to apply intentional infliction of emotional distress based on sexual misconduct in counseling relationships with parishioners.⁸⁷ While child sexual abuse seems to be a clearer example of

79. Youtha C. Hadman-Cromwell, *Power and Sexual Abuse in Ministry*, 48 J. RELIGIOUS THOUGHT 65, 67 (1991).

80. *Id.* at 67-68.

81. BETRAYAL, *supra* note 1, at 80.

82. RESTATEMENT (SECOND) OF TORTS § 46(1) (1965).

83. *Id.* § 312.

84. *Id.*

85. *Meroni v. Holy Spirit Ass’n for Unification of World Christianity*, 506 N.Y.S.2d 174 (App. Div. 1986).

86. *Strock v. Pressnell*, 527 N.E.2d 1235, 1238-39 (Ohio 1988).

87. *Schieffer v. Catholic Archdiocese*, 508 N.W.2d 907, 911 (Neb. 1993); *see also* *Langford v. Roman Catholic Diocese*, 705 N.Y.S.2d 661 (App. Div. 2000) (refusing to apply

outrageous conduct, courts rarely permit the application of emotional distress to it.⁸⁸

C. Breach of Fiduciary Duty

Sexual misconduct within the church has deeply affected its victims, as evidenced by the increasing number of support groups and organizations fighting clergy abuse.⁸⁹ Most parishioners see their priest, pastor, or minister as one whom they can trust with complete confidence. A fiduciary is “[o]ne who owes to another the duties of good faith, trust, confidence, and candor,”⁹⁰ and a fiduciary relationship establishes a “duty to act for the benefit of the other on matters within the scope of the relationship.”⁹¹ Clergy members fall within these definitions because they set themselves apart as counselors and confidants to their parishioners, instilling a deep sense of trust and security.⁹² Indeed, clergy have superior authority because of their entrenchment in the particular religious institution and their representation of God.⁹³

Although the fiduciary relationship and subsequent duty seem apparent, courts are divided in their application of the tort of breach of fiduciary duty to clergy. The Michigan Court of Appeals refused to allow a cause of action for breach of fiduciary duty arising out of a sexual relationship between a parishioner and her pastor, who was acting as a counselor.⁹⁴ The court held that the parishioner could not “establish any imbalance of power in the relationship or explain why she would repose trust in [the pastor] without resorting to the fact that [he] was her pastor,”⁹⁵ thereby making religion the foundation of the cause of action, “‘not merely incidental’” to it.⁹⁶ The court,

negligent infliction of emotional distress to sexual misconduct in religious counseling relationship between priest and parishioner).

88. See *Osborne v. Payne*, 31 S.W.3d 911, 915 (Ky. 2000) (stating that cases of intentional infliction of emotional distress should “be approached on a case-by-case basis” because there is no automatic recovery in the clergy/counselor relationship); *Borchers v. Hrychuk*, 727 A.2d 388, 393 (Md. Ct. Spec. App. 1999) (stating that absent a special relationship from an officially-sanctioned treatment relationship, sex between a pastor counselor and his parishioner does not reach the level of “extreme and outrageous conduct”); *Langford*, 705 N.Y.S.2d at 662 (dismissing a claim for negligent infliction of emotional distress because of its similarities to clergy malpractice, which would require a “‘venture into forbidden ecclesiastical terrain’”).

89. See *supra* Part II.B.

90. BLACK’S LAW DICTIONARY 640 (7th ed. 1999).

91. *Id.*

92. See *F.G. v. MacDonell*, 696 A.2d 697, 704 (N.J. 1997).

93. Arnold, *supra* note 9, at 43.

94. *Teadt v. Lutheran Church Mo. Synod*, 603 N.W.2d 816, 823 (Mich. Ct. App. 2000).

95. *Id.*

96. *Id.* (quoting *Amato v. Greenquist*, 679 N.E.2d 446, 454 (Ill. App. Ct. 1997)).

unable to separate religious doctrine from the fiduciary duty, refused to admit the breach.

Conversely, other courts have found the breach of fiduciary duty as a viable cause of action because of its lessened requirements as compared to clergy malpractice. The New Jersey Supreme Court held that a breach of fiduciary duty claim avoids the excessive entanglement with religion argument and allows a parishioner to recover for damages suffered from inappropriate sexual conduct in the counseling relationship.⁹⁷ In determining the feasibility of this tort, the court stated, "The First Amendment does not insulate a member of the clergy from actions for breach of fiduciary duty arising out of sexual misconduct that occurs during a time when the clergy member is providing counseling to a parishioner."⁹⁸ The court further held that by accepting the parishioner into a counseling relationship, the cleric also accepts the responsibility of a fiduciary.⁹⁹

Currently, courts are more likely to accept a breach of fiduciary duty than a clergy malpractice claim because they perceive a difference in the degree of religious entanglement.¹⁰⁰ Courts can determine a breach of fiduciary duty claim through a bright-line approach, which focuses on the existence of a counseling relationship, determination of a breach through sexual misconduct, and a rebuttable presumption that the cleric is responsible.¹⁰¹ Even though this bright-line approach is definable, the breach of fiduciary duty claim remains problematic because of the difficulty in defining breach and the reluctance of courts to allow the claims to stand. Indeed, the Seventh Circuit noted the difficulty in applying and defining a breach of fiduciary duty in the religious context because the minister's conduct would have to be measured against a judicially fabricated standard.¹⁰² Courts that have accepted the tort of breach of fiduciary duty simply state that courts may define the duty without excessively entangling religion but should not set a specific standard that could apply in more than a case-by-case analysis.¹⁰³ The most common breach

97. *MacDonell*, 696 A.2d at 703.

98. *Id.* at 702.

99. *Id.* at 704.

100. *See Enderle v. Trautman*, No. CIV. 13-01-22, 2001 WL 1820145, at *5 (D.N.D. Dec. 3, 2001) (stating that "while the clergy malpractice claim may require the development of a 'reasonable clergy' standard, the . . . standard to which a fiduciary is held is not that of a 'reasonable clergy person' . . . but rather that of a 'fiduciary'") (second omission in original).

101. *Zanita E. Fenton, Faith in Justice: Fiduciaries, Malpractice & Sexual Abuse by Clergy*, 8 MICH J. GENDER & L. 45, 90-91 (2001).

102. *Dausch v. Rykse*, 52 F.3d 1425, 1438 (7th Cir. 1994); *see also Hawkins v. Trinity Baptist Church*, 30 S.W.3d 446, 453 (Tex. App. 2000) (applying the *Dausch* reasoning and not accepting the tort of breach of fiduciary duty).

103. *MacDonell*, 696 A.2d at 703-04.

used in clergy misconduct cases is "sexually inappropriate conduct in the course of pastoral counseling."¹⁰⁴ Such an action presents an example of a breach but fails to establish a broad definition, leaving the tort of breach of fiduciary duty to a case-by-case application with little continuity.

D. Respondeat Superior

Ofentimes, victims of clergy sexual abuse file suit against the institutional church, which has greater assets and insurance to cover its losses.¹⁰⁵ By focusing on the church, instead of the cleric, the victim faces a more difficult burden. Under the tort of respondeat superior, a victim must prove that the cleric executed an intentional tort while in the scope of employment.¹⁰⁶ "An act is committed within 'the scope . . . of employment' if it is done by virtue of the employment and in furtherance of the business or interest of the employer, regardless of the time or motive of the conduct."¹⁰⁷ Problems arise with respondeat superior because any intentional tort likely does not fall within the scope of employment. Indeed, inappropriate sexual conduct is clearly not within the scope of employment of a church that requires celibacy of its clerics.¹⁰⁸ Because sexual misconduct falls far outside a cleric's duty in most religions, accepting inappropriate conduct as within the scope of employment would force a contrived and awkward application of respondeat superior.¹⁰⁹

Respondeat superior fails in its application to churches for two additional reasons. First, the action requires foreseeability.¹¹⁰ The victim must prove that the church knew or should have known that the cleric committed or would commit an intentional tort.¹¹¹ Courts require foreseeability because the doctrine of respondeat superior does not apply to intentional or willful acts committed by an agent or employee to vent his own malevolence against another.¹¹² Liability based on respondeat superior must correspond to conduct

104. *Id.* at 703.

105. O'Reilly & Strasser, *supra* note 20, at 38.

106. *Id.* at 39.

107. H.R.B. v. J.L.G., 913 S.W.2d 92, 97 (Mo. Ct. App. 1995).

108. Destefano v. Grabrian, 763 P.2d 275, 287 (Colo. 1988).

109. See also Joshua S. v. Casey, 615 N.Y.S.2d 200, 201 (App. Div. 1994) (stating that respondeat superior applies liability only when the act was "within the scope of employment and in furtherance of the employer's business"); Byrd v. Faber, 565 N.E.2d 584, 588 (Ohio 1991) (stating that respondeat superior was not applicable because the church "in no way promotes or advocates nonconsensual sexual conduct between pastors and parishioners").

110. O'Reilly & Strasser, *supra* note 20, at 41.

111. *Id.* at 39.

112. Byrd, 565 N.E.2d at 588.

characteristic of the church's activities or be reasonably foreseeable.¹¹³ Proving foreseeability is nearly impossible.¹¹⁴ Second, applying respondeat superior creates the question of whether the minister or priest is an employee of the church or merely an independent contractor.¹¹⁵ The priest or minister exercises a large amount of independent judgment without the supervision of the church or religious denomination.¹¹⁶ With a disparity in hiring practices among religious institutions, it is again too difficult to apply respondeat superior to the church because of the difficulty in defining the employer-employee relationship and the lack of uniformity in its application.

E. Negligent Hiring and Supervision

The final tort currently applied to clergy misconduct is negligent hiring and supervision. Negligent hiring and supervision includes the negligence or recklessness of an employer in giving improper or ambiguous directions, employing improper persons involving risks to others, failing to supervise the employee's activity, or permitting or failing to prevent negligent or tortious conduct.¹¹⁷ In negligent hiring, a victim must show a "failure to exercise reasonable care in [selecting] employees,"¹¹⁸ and in negligent supervision, a victim must show a "failure to supervise."¹¹⁹ The burden of proof for negligent hiring and supervision is quite high, as victims must prove that the church retained actual knowledge of misconduct and "ignored the situation."¹²⁰ Additionally, the known hiring of a cleric with previous misconduct alone is insufficient to prove negligent hiring and supervision.¹²¹ The victim must also prove that a foreseeable, unreasonable risk of injury existed.¹²²

Courts are split on whether to accept negligent hiring and supervision as applied to churches for clergy sexual misconduct. Courts rejecting the tort claim state that "[q]uestions of hiring, ordaining, and retaining clergy, however, necessarily involve interpretation of religious doctrine, policy, and

113. *Id.*

114. *See* Tichenor v. Roman Catholic Church of Archdiocese New Orleans, 32 F.3d 953, 959-60 (5th Cir. 1994); Moses v. Diocese of Colo., 863 P.2d 310, 329 (Colo. 1993); H.R.B. v. J.L.G., 913 S.W.2d 92, 97 (Mo. Ct. App. 1995).

115. ROBERT W. MCMENAMIN, CLERGY MALPRACTICE 68 (1986).

116. *Id.*

117. RESTATEMENT (SECOND) OF AGENCY § 213 (1958).

118. Arnold, *supra* note 9, at 42.

119. *Id.*

120. *Id.* at 42-43.

121. *Id.* at 43.

122. *Id.*

administration.”¹²³ The Missouri Supreme Court feared that judicial inquiry into those practices “would result in an endorsement” of a particular religion by approving one hiring structure and disapproving another.¹²⁴ Furthermore, the court found that determining reasonableness regarding what the church “should have known” would create an excessive entanglement with religion and lead to endorsement of one supervision plan.¹²⁵ Furthermore, courts that reject this claim are adamant that assessing qualifications to be a minister and appointment and retirement of ministers are “ecclesiastical matters entitled to constitutional protection against judicial or other State interference.”¹²⁶

However, the Florida Supreme Court accepted negligent hiring and supervision in *Malicki v. Doe*.¹²⁷ In *Malicki*, the court stated that the inquiry into hiring practices does not violate the First Amendment because the question is “whether the specific danger that ultimately manifested itself . . . reasonably could have been foreseen at the time of hiring.”¹²⁸ By not questioning the reasons for the hiring, but instead focusing on whether the problem was foreseeable, the *Malicki* court removed the First Amendment barrier and accepted a claim of negligent hiring and supervision. The tort of negligent hiring and supervision remains a question of how each jurisdiction will determine the issue. With one side fearing First Amendment infringement and the other side attempting to secularize the hiring process, a general consensus is difficult to find.

IV. Clergy Malpractice: A New Remedy for Clergy Sexual Misconduct

The tort of clergy malpractice developed approximately fifteen years ago.¹²⁹ Since its initial claim, the tort has received varying applications, from failure to prevent a parishioner’s suicide,¹³⁰ and publicizing a relationship between

123. Gibson v. Brewer, 952 S.W.2d 239, 246-47 (Mo. 1997).

124. *Id.* at 247.

125. *Id.*

126. Leary v. Geoghan, No. 990371, 2000 WL 1473579, at *1 (Mass. Super. Ct. June 28, 2000) (quoting Alberts v. Devine, 479 N.E.2d 113, 122 (Mass. 1985)).

127. 814 So. 2d 347 (Fla. 2002).

128. *Id.* at 362.

129. According to one scholar, the first recorded claim against a pastor for clergy malpractice was for alienation of affection in *Carrieri v. Bush*, 419 P.2d 132 (Wash. 1966). See Thomas L. Needham, *Malpractice in the Ministry*, in CLERGY MALPRACTICE 9, 18 (H. Newton Malony et. al. eds., 1986).

130. Nally v. Grace Cmty. Church of the Valley, 763 P.2d 948 (Cal. 1988); see also Roppolo v. Moore, 93-2361 (La. App. 4 Cir. 7/27/94), 644 So. 2d 206 (finding no clergy malpractice cause of action for wrongful death relating to suicide of parishioner who had a sexual relationship with an Episcopal priest).

a clergyman and a parishioner in a sermon and letter,¹³¹ to sexual relationships developing out of faith or marital counseling,¹³² and sexual abuse of a minor.¹³³

A. *The History of Clergy Malpractice*

Victims have asserted clergy malpractice as a cause of action since the first attempt in 1980, in *Nally v. Grace Community Church of the Valley*.¹³⁴ In *Nally*, a young man attending the University of California at Los Angeles sought pastoral counseling from pastors at the Grace Community Church, befriended the pastors, and later converted to Protestantism.¹³⁵ Nally attempted suicide, and, while in the hospital, apologized to his pastors for not succeeding and asked them whether he could be “saved” if he committed suicide.¹³⁶ Eleven days later, Nally committed suicide, and his parents sued Grace Community Church for “clergyman malpractice” in failing to refer their son for counseling and further treatment.¹³⁷ The California Court of Appeals accepted the theory of clergyman malpractice, finding that the church and the pastors had a duty of care to refer Nally for additional psychiatric treatment.¹³⁸ The court held that “nontherapist counselors — *both religious and secular* — have a duty to refer suicidal persons to psychiatrists or psychotherapists qualified to prevent suicides.”¹³⁹ The California Supreme Court, however, did not extend the duty as far as the court of appeals. Instead, the California Supreme Court held that the duty to refer for nontherapist counselors in general was too broad and beyond the scope of the duties of a counselor,¹⁴⁰

131. *F.G. v. MacDonell*, 696 A.2d 697, 700 (N.J. 1997) (finding no cause of action for clergy malpractice for publicizing a private relationship between a clergyman and parishioner, but allowing a breach of fiduciary duty claim to stand if it passes the First Amendment hurdle).

132. *Amato v. Greenquist*, 679 N.E.2d 446 (Ill. App. Ct. 1997) (finding no cause of action for clergy malpractice from a sexual relationship during faith counseling between a Lutheran pastor and the plaintiff's wife).

133. *Schmidt v. Bishop*, 779 F. Supp. 321 (S.D.N.Y. 1991) (finding no cause of action for clergy malpractice from a sexual relationship between a Presbyterian minister and a girl he was counseling).

134. 763 P.2d 948 (Cal. 1988). Although the California Supreme Court did not decide *Nally* until 1988, the case was filed in 1980. No. NCC-18668-B (Cal. App. Dep't Super. Ct.); see Ben Zion Bergman, *Is the Cloth Unraveling? A First Look at Clergy Malpractice*, in CLERGY MALPRACTICE, *supra* note 129, at 45, 46 n.5.

135. *Nally*, 763 P.2d at 950.

136. *Id.* at 951-52.

137. *Id.* at 952.

138. *Id.* at 954.

139. *Id.*

140. *Id.* at 955-56.

and that such accountability would unreasonably place blame and contravene public policy.¹⁴¹

Since *Nally*, courts across the United States have faced the issue of whether to apply clergy malpractice. Following *Nally*, analysts predicted both an increased willingness of people to sue their clergy and of courts to hear such cases.¹⁴² This predicted trend has come true, but to date, no court has applied clergy malpractice¹⁴³ without a relevant statute.¹⁴⁴ From fears of First Amendment violations¹⁴⁵ and the inability to define a standard of care,¹⁴⁶ to avoiding judicial activism,¹⁴⁷ and preventing public policy infringements,¹⁴⁸ courts have found more reasons to avoid implementing clergy malpractice than reasons to endorse it.

B. Defining Clergy Malpractice

Clergy malpractice has received growing attention in the last decade and has received several definitions as a result. Malpractice in general is defined as “[a]n instance of negligence or incompetence on the part of a professional.”¹⁴⁹ Clergy malpractice is “the failure to exercise the degree of care and skill normally exercised by members of the clergy in carrying out their professional duties.”¹⁵⁰ This tort theory “presupposes that every cleric owes the same duty of care, whatever the religious order which granted

141. *Id.* at 961.

142. Needham, *supra* note 129, at 21-22.

143. *Dausch v. Rykse*, 52 F.3d 1425, 1432 n.4 (7th Cir. 1994). The Alabama, Colorado, Ohio and Nebraska state supreme courts have held that there is no cause of action for clergy malpractice. *Id.* The Missouri and Oklahoma state supreme courts have not accepted clergy malpractice but have failed to determine the propriety. *Id.* California, Louisiana, New York and Pennsylvania state courts have refused to recognize the claim of clergy malpractice. *Id.*

144. *See Odenthal v. Minn. Conf. of Seventh-day Adventists*, 649 N.W.2d 426, 439 (Minn. 2002) (holding minister liable for malpractice under “unlicensed mental health practitioner” statute).

145. *Lann v. Davis*, 34,892 (La. App. 2 Cir. 8/22/01), 793 So. 2d 463, 465 (La. Ct. App. 2001) (stating that judicial review of pastoral counseling would cause inquiry into religious fundamentals and violate “the First Amendment’s separation of church and state”).

146. *F.G. v. MacDonell*, 696 A.2d 697, 703 (N.J. 1997) (fearing that defining a standard of care would “embroil” courts in defining the proper training, skill, and standards “in a diversity of religions with widely varying beliefs”).

147. *Borchers v. Hrychuk*, 727 A.2d 388, 395 (Md. Ct. Spec. App. 1999) (stating that the primary reason for refusing to recognize clergy malpractice was the court’s adjudicatory role).

148. *Alexander v. Culp*, 705 N.E.2d 378, 381 (Ohio Ct. App. 1997) (courts have stated that accepting clergy malpractice would contravene public policy).

149. BLACK’S LAW DICTIONARY 971 (7th ed. 1999).

150. *Byrd v. Faber*, 565 N.E.2d 584, 586 (Ohio 1991).

ordination, or the cleric serves, or the beliefs espoused,"¹⁵¹ and is often "intended to remedy error in pastoral counsel or advice."¹⁵² Finally, scholars have defined clergy malpractice as "(1) a breach of fiduciary duty unique to practitioners of divinity (2) by outrageous conduct that (3) causes (4) injury to a client (5) who has relied on the cleric's obligation or moral conduct."¹⁵³

Each definition provides a different approach to applying clergy malpractice. However, the best definition of clergy malpractice combines each of these definitions. This comment, will define clergy malpractice as (1) failure to exercise the degree of care and skill unique to practitioners of divinity (2) in a parishioner's relationship based on counseling or conduct (3) by outrageous conduct that (4) causes a definable injury to the parishioner (5) who relied upon the cleric's advice, moral conduct, or counseling.¹⁵⁴

C. Defining Clerical Duties and Responsibilities to Establish a Standard of Care

Clergy have many roles in society. Their parishioners know them as spiritual and secular counselors, public speakers, interpreters, educators, scholars, and mentors in addition to their roles as congregational leaders. The counseling role developed out of the priest's position in medieval Europe as the only educated or literate person in the community, and people sought a priest's counsel for both pragmatic and spiritual problems.¹⁵⁵ Each religious organization defines its clergy differently, but collectively clergy are "persons ordained for religious services."¹⁵⁶ To accept the tort of clergy malpractice, clergy must be accepted as professionals. A professional is "[a] person who belongs to a learned profession or whose occupation requires a high level of training and proficiency."¹⁵⁷ Analyzing the definitions of clergy and professional, the view of the clergy as professionals rests on the belief that ordination requires some level of education or training. Many clergy, though not all,¹⁵⁸ have formal or informal training in seminary or divinity school; however, some denominations require no such training or education.¹⁵⁹ "To be a legal minister," a person need only "be ordained by a local church that is

151. *Hester v. Barnett*, 723 S.W.2d 544, 553 (Mo. Ct. App. 1987).

152. *Fenton*, *supra* note 101, at 55-56.

153. *Arnold*, *supra* note 9, at 47.

154. This definition was developed from previous definitions by judges and scholars.

155. *Bergman*, *supra* note 134, at 45.

156. WEBSTER'S NEW WORLD COLLEGE DICTIONARY 273 (4th ed. 2000).

157. BLACK'S LAW DICTIONARY 1226 (7th ed. 1999).

158. Some clergy may become ordained through less strict educational requirements, such as through online registration. *See, e.g.*, Universal Ministries, at <http://www.universalministries.com> (last visited Jan. 21, 2004).

159. *GAYLOR*, *supra* note 3, at 24.

recognized by the state.”¹⁶⁰ Even without formalized training, clergy must be familiar with church doctrine and policy in addition to religious interpretation. With a certain degree of specialization necessary for each denomination, most clergy meet the standard of a professional by acquiring a base level of knowledge in religion or theology. Education alone does not establish the cleric as a professional, but combined with knowledge obtained through service, the cleric satisfies the standard of professional learnedness.¹⁶¹ If clergy meet the professional requirement discussed above, the clergy must be held to a standard of care¹⁶² for malpractice to apply. The standard in determining negligence is that of a “reasonable man under like circumstances.”¹⁶³ A standard of care is necessary to establish clergy malpractice because any application of the tort requires a breach of the accepted standard of care.¹⁶⁴ Additionally, the standard of care is essential for presenting sufficient evidence for a judge or jury to determine whether there is an actionable deviation from that standard.¹⁶⁵ The standard of care cannot violate First Amendment protections; otherwise, the clergy malpractice tort will fail before it is ever applied. Scholars recommend four purely academic standards of care in the development of clergy malpractice: (1) “secular standard,” (2) “state of the art standard,” (3) “denominationally specific standard,” and (4) “neutral standard of care.”¹⁶⁶

160. *Id.*

161. Therefore, a cleric from a religious denomination that does not require extensive training or education may still satisfy the standard of professional learnedness through acquired knowledge. That knowledge may be obtained on the job or from being mentored by other clergy.

162. “Standard of care” is defined as “the degree of care that a reasonable person should exercise.” BLACK’S LAW DICTIONARY 1413 (7th ed. 1999).

163. RESTATEMENT (SECOND) TORTS § 283 (1965).

164. The standard of care applies in two types of situations: counseling and mentoring. Counseling occurs in a structured environment and consists of advising a parishioner regarding “educational and occupational alternatives, personal problems, etc.” WEBSTER’S NEW WORLD COLLEGE DICTIONARY 331 (4th ed. 2000). Mentoring occurs in a more nonstructured relationship. Mentoring is not a particular activity but consists of a pattern of interactions between a priest and parishioner. This type of relationship could develop a greater amount of trust because of the continuing nature of the relationship.

165. Constance Frisby Fain, *Clergy Malpractice: Liability for Negligent Counseling and Sexual Misconduct*, 12 MISS. C. L. REV. 97, 97-98 (1991).

166. Margaret Ann Burton, Comment, *Nally v. Grace Community Church: Is There a Future for Clergy Malpractice Claims?* 37 SANTA CLARA L. REV. 467, 472 (1997).

1. *The Secular Standard*

The secular standard separates pastoral counseling from the religious function of the cleric,¹⁶⁷ analogizing pastoral counseling to psychiatric or psychological counseling.¹⁶⁸ The standard emphasizes the skill, expertise, care, and diligence in taking care of responsibilities to a patient or parishioner.¹⁶⁹ Essentially, the secular standard finds religion as only an incidental part of the counseling relationship and does not allow it to interfere with the standard of care.

Legal scholars greatly criticize the secular standard because of the inconsistencies in training and treatment methods between a cleric-counselor and a conventional counselor.¹⁷⁰ Oftentimes, a cleric-counselor's training occurs in his education to become a minister, rather than through education to become a counselor.¹⁷¹ Additionally, because the cleric-counselor's advice often rests on theology, imposing the mental health professional standard of care may be unreasonable.¹⁷²

2. *The State-of-the-Art Standard*

The purpose behind holding clergy to the same standards as their secular counterparts is to force clergy to learn at least current elementary psychological knowledge.¹⁷³ The state-of-the-art standard heavily burdens clerics because it requires a cleric to be familiar with the most state-of-the-art counseling procedures, principles, and trends.¹⁷⁴ The standard evolves with the changing principles of psychotherapy and counseling.¹⁷⁵ Moreover, the continuing education requirement places a heavy burden on a cleric to remain abreast of the current principles and methods of counseling.¹⁷⁶ If a cleric fails to meet that demanding standard, he may be held liable for malpractice.

Proponents of the state-of-the-art standard argue that religious conscience should compel the clergy to acquire greater competence and responsibility to better serve their parishioners.¹⁷⁷ The standard would then not hinder the

167. *Id.*

168. *Id.*

169. Fain, *supra* note 165, at 101-02.

170. *Id.* at 102.

171. *Id.*

172. *Id.*

173. Bergman, *supra* note 134, at 58.

174. Burton, *supra* note 166, at 472.

175. Fain, *supra* note 165, at 102.

176. *Id.*

177. Bergman, *supra* note 134, at 58.

clergy's ability to counsel and assist his congregants, but instead would enhance his ability by giving his congregants a greater sense of security in the cleric's competence, knowledge, and sincerity.¹⁷⁸ However, critics disapprove of the state-of-the-art standard because of the heavy burden it places upon clerics to maintain their knowledge and stay abreast to developments in counseling.¹⁷⁹ Also, psychiatric or psychological developments might contradict the cleric's theological philosophy.¹⁸⁰ Thus, forcing a cleric to adopt views contrary to his religion's philosophy would inhibit the free exercise of religion and hinder the cleric's counseling function.

3. *The Denominationally Specific Standard*

The denominationally specific standard developed from a general comparison of one cleric's conduct with that of other clerics in the community who represent similar religious philosophies.¹⁸¹ This standard allows for comparison to other clergy in the same denomination and also accounts for the scope of training in the community.¹⁸² Commentators criticize the denominationally specific standard most forcefully because they fear that this standard would require courts to analyze and assess church doctrine, which would offend the First Amendment.¹⁸³ Indeed, the problems far outweigh the benefits of this standard because courts must scrutinize and assess a cleric's religious doctrine and compare that with other similar religions.¹⁸⁴ The only way to avoid the entanglement issue inherent in assessing religious doctrine would be to look only to secular documents in the church, such as the Roman Catholic Church's Charter¹⁸⁵ and Norms,¹⁸⁶ which establish nonreligious policies to manage sexual misconduct within the Catholic Church.

4. *The Neutral Standard of Care*

The final standard of care is the neutral standard, which consists of a threshold test to determine whether to impose the standard of care, followed by a three-prong test to determine whether a violation occurred.¹⁸⁷ The neutral standard of care, as espoused by legal theorists, applies only to a cleric-

178. *Id.*

179. Fain, *supra* note 165, at 102-03.

180. *Id.*

181. *Id.* at 103.

182. Burton, *supra* note 166, at 472-73.

183. Fain, *supra* note 165, at 103.

184. *Id.*

185. CHARTER, *supra* note 39.

186. Catholic Bishops, *Norms*, *supra* note 56.

187. Burton, *supra* note 166, at 473.

parishioner counseling relationship.¹⁸⁸ The threshold test has two parts. First, the test analyzes whether the religious counseling intends to move towards an identifiable goal recognized by both the cleric and the parishioner.¹⁸⁹ Second, the test analyzes how both parties perceive the relationship.¹⁹⁰ The two-part threshold test establishes both an objective and subjective criteria of the cleric-parishioner relationship before establishing whether malpractice occurred.¹⁹¹

If the threshold test is met, the relationship must satisfy three subsequent prongs. The first prong requires testing and diagnosis.¹⁹² The testing phase of the counseling relationship forces a cleric to understand a parishioner's emotional and psychological problems.¹⁹³ The second prong requires a "referral to a qualified professional."¹⁹⁴ If the cleric finds, after testing, that the parishioner's emotional or psychological problems exceed his expertise, the cleric must refer the parishioner to a qualified professional.¹⁹⁵ The third prong requires training.¹⁹⁶ Training forces the cleric to have minimal diagnostic skills.¹⁹⁷ A cleric must meet all three prongs to be held to the neutral professional standard of care in a counseling relationship. Although this standard is objective, its scope is too narrow because it only addresses the counseling relationship and fails to cover all of the areas in which misconduct occurs in the clergy-parishioner relationship.

D. Defining a Standard of Care by Looking Beyond the Religious Beliefs

Clergy malpractice requires developing a standard of care that does not infringe on religious rights but that also establishes a clear boundary for breach.¹⁹⁸ This comment sets forth and discusses four possible standards of care — secular standard, state of the art standard, denominationally specific standard, and neutral standard. These standards are purely academic, as courts have not endorsed any one theory of standard of care because most believe that defining any standard of care would violate the First Amendment.¹⁹⁹ For

188. *Id.* at 512.

189. *Id.* at 511.

190. *Id.*

191. *Id.*

192. *Id.*

193. *Id.*

194. *Id.*

195. *Id.*

196. *Id.* at 512.

197. *Id.*

198. Scott C. Idleman, *Tort Liability, Religious Entities, and the Decline of Constitutional Protection*, 75 IND. L.J. 219, 233 (2000).

199. *Enderle v. Trautman*, No. CIV. 13-01-22, 2001 WL 1820145 (D.N.D. Dec. 3, 2001).

example, in *F.G. v. MacDonell*,²⁰⁰ the New Jersey Supreme Court addressed the question of whether an appropriate standard of care could be determined. The court stated that the most difficult hurdle in establishing the clergy malpractice tort is defining a relevant standard of care without infringing upon the First Amendment.²⁰¹ The court reasoned that “[d]efining that standard could embroil courts in establishing the training, skill, and standards applicable for members of the clergy in a diversity of religions with widely varying beliefs.”²⁰² The secular standard of care avoids the First Amendment problem. In applying the secular standard of care, courts could separate the counseling function of the cleric’s conduct from the religious function. Even though religion pervades the counseling process, the actual act of counseling or the conduct in the relationship establishes a duty to exercise the degree of care and skill unique to practitioners of divinity. The duty to exercise a reasonable degree of care may be derived from a secular document that outlines the proper procedure in a counseling situation or when speaking and interacting with children and young people. Moreover, the definition of clergy malpractice proposed in this comment requires “a breach of fiduciary duty unique to practitioners of divinity.” This standard takes into account the presence of religion but does not accept it as the most important determinant. To remove religion entirely from any standard of care definition would be impossible because it explains the presence of the counseling or mentoring relationship. Without religion, parishioners would not seek out their clergy for guidance. Religion is the foundation of the cleric-congregant relationship, but the interactions can be separated by focusing on the type of relationship itself instead of the religion surrounding it. Assessing a standard of care in this manner distinguishes between religion and counseling. For example, the duty and subsequent breach may be derived by compliance with a secular document, such as those created by the Roman Catholic Church. If a cleric violates the secular document by improperly interacting with a child, the breach would be related to the secular document, not the religious belief. Also, if a cleric fails to meet the requirements set forth in the policy regarding how to handle cases of clergy sexual misconduct by either ignoring the incidents or by covering them up, the cleric would have breached the wholly secular policy regarding these actions. The focus on such a document removes concerns about religious infringement.

Since the scandal in the Roman Catholic Church has become increasingly prevalent, separating religion from the standard of care has become easier.

200. 696 A.2d 697 (N.J. 1997).

201. *Id.* at 703.

202. *Id.* Note also that this same concern has kept courts from accepting claims for breach of fiduciary duty. *Id.*

Religious institutions have adopted secular policy documents that detail the standard of care necessary for their clergy.²⁰³ For example, the Roman Catholic Church's Charter and Norms provide the proper standard when dealing with children and consequently establish the punishment for failing to meet that standard.²⁰⁴ Priests and deacons can be held to the standard set forth in the Charter and the Norms without entangling courts in interpreting religious doctrine. Moreover, bishops can be held to an equally secular standard of care. As the overseeing body of both the Charter and the Norms, courts could hold bishops liable for clergy malpractice if they fail to enforce the document in their dioceses. By eliminating church doctrine, or canon law, the Charter and the Norms present a wholly secular document with a definable standard.

Courts readily admit that sexual misconduct does not fall within the scope of religious duties and that no problem in understanding the standard of care occurs because "reasonably prudent clergy of any sect do not molest children."²⁰⁵ Even while admitting that fact, courts still refuse to allow for the tort of clergy malpractice because they fear that such a tort places the courts on a "slippery slope."²⁰⁶ Courts acknowledge that the difficulty in determining the standard of care does not arise in a case involving sexual abuse of a minor, but instead surfaces in a case involving disapproval in a sermon or in subsequent cases of misconduct.²⁰⁷ By applying a clear definition and precise standard of care, courts can avoid the slippery slope. Although clergy malpractice may open the door to more litigation against churches and their clergy, it will allow greater recovery for the traumas suffered by the victims of sexual misconduct and exploitation.

The First Amendment does not require judicial deference when doctrinal controversy is not involved, and in cases of sexual misconduct, no such doctrinal imposition exists.²⁰⁸ In sexual misconduct cases, creating a standard of care that does not violate the tenets of any religious denomination is possible. By giving no greater deference to tortious conduct committed by religious actors or institutions than nonreligious actors or institutions, courts avoid problems of entanglement.²⁰⁹ If courts hold all nonlicensed counselors to the same standard of care, the fact that the counselor is also a cleric does not bear any additional weight. A law that establishes standards of conduct

203. See *supra* notes 39, 56 and accompanying text.

204. Catholic Bishops, *Norms*, *supra* note 56.

205. *Schmidt v. Bishop*, 779 F. Supp. 321, 328 (S.D.N.Y. 1991).

206. *Id.*

207. *Id.*

208. *Amato v. Greenquist*, 679 N.E.2d 446, 451-52 (Ill. Ct. App. 1997).

209. *Malicki v. Doe*, 814 So. 2d 347, 360 (Fla. 2002).

“does not implicate the Free Exercise Clause unless adherence to those standards interferes with religious belief or activity.”²¹⁰ Thus, holding both nonclerics and clerics to the same standard of care in a counseling relationship or when interacting with children would not interfere with religious activity or belief. Instead, the standard of care for both gives no greater or lesser deference to religious organizations than to nonreligious entities.²¹¹

E. Further Criticisms of the Tort of Clergy Malpractice

The initial hurdle in defining the tort of clergy malpractice is defining which standard of care to apply; however, accepting the tort of clergy malpractice has three additional criticisms: (1) incorporating clergy malpractice would require judicial activism; (2) the clergy malpractice cause of action is a redundant remedy; and (3) clergy malpractice violates the fundamental value of the First Amendment by infringing on religious freedom. The following discussion illustrates the merits and flaws of each criticism.

1. Incorporating the Tort of Clergy Malpractice Would Require Judicial Activism

Courts addressing the tort of clergy malpractice frequently state that no other jurisdiction has allowed the tort claim to stand. These sentiments confirm the fears surrounding judicial activism. The court in *Borchers v. Hrychuk*,²¹² for example, submitted to concerns about judicial activism when it examined the application of clergy malpractice to a sexual relationship that developed during a counseling relationship between a Seventh-day Adventist minister and a parishioner. The court did not scrutinize the merits of applying clergy malpractice but instead refused to accept the tort based on its adjudicatory role, stating,

As the state's intermediate appellate court, our primary function is to correct error, and not to pronounce new substantive legal rules. Further, when we do pronounce such rules, it is important that our pronouncements have at least some basis in either previous rulings of the Court of Appeals or statute. Neither the Court of Appeals nor the General Assembly have ever indicated that they would recognize the tort of clergy malpractice; and in the absence of such authority, it would be improper for us to recognize such a tort here.²¹³

210. *Id.*

211. *Id.*

212. 727 A.2d 388 (Md. Ct. Spec. App. 1999).

213. *Id.* at 395.

Although adopting the tort of clergy malpractice appears to take judicial activism, the tort has well-established roots in modern tort law.²¹⁴ The malpractice duty of care is the general requirement to exercise the skill and knowledge of members of a particular profession.²¹⁵ Malpractice applies to many professions,²¹⁶ including physicians,²¹⁷ attorneys,²¹⁸ engineers,²¹⁹ accountants,²²⁰ dentists,²²¹ pharmacists,²²² and psychiatrists.²²³ Additionally, creative attorneys increasingly employ educational malpractice,²²⁴ consultant malpractice,²²⁵ and computer malpractice²²⁶ in current litigation. Each application requires a professional be held to a certain standard determined by the courts or the legislature.²²⁷ A malpractice standard serves to raise the competence level within a profession and to protect those who interact with the profession.²²⁸ With a defined standard of care, such as a standard based upon the secular policies of the church, a court could extend malpractice to clergy without excessively entangling itself in questions of religious freedom. Basing the malpractice definition on a secular standard, rather than forcing courts to evaluate each religion's belief system would establish a unified standard without radical judicial activism.

2. *The Clergy Malpractice Cause of Action is a Redundant Remedy*

Legal scholars and courts alike believe the tort of clergy malpractice overlaps with the existing intentional torts, such as battery, negligent or intentional infliction of emotional distress, breach of fiduciary duty, or

214. RESTATEMENT (SECOND) TORTS § 299A cmt. b (1965).

215. *Id.* § 299A.

216. *Id.* § 299A cmt. b.

217. *See* Nowatske v. Osterloh, 549 N.W.2d 256 (Wis. Ct. App. 1996).

218. *See* McCullough v. Sullivan, 132 A. 102 (N.J. Ct. Err. & App. 1926).

219. *See* Cowles v. City of Minneapolis, 151 N.W. 184 (Minn. 1915).

220. *See* L.B. Lab., Inc. v. Mitchell, 244 P.2d 385 (Cal. 1952).

221. *See* United Dentists v. Bryan, 164 S.E. 554 (Va. 1932).

222. *See* Allan v. State S.S. Co, 30 N.E. 482 (N.Y. 1892).

223. *See* Hammer v. Rosen, 165 N.E.2d 756 (N.Y. 1960).

224. *See* Peter W. v. S.F. Unified Sch. Dist., 131 Cal. Rptr. 854 (Cal. Ct. App. 1976).

225. *See* Hosp. Computer Sys., Inc. v. Staten Island Hosp., 788 F. Supp. 1351 (D.N.J. 1992).

See generally Richard A. Glaser & Leslee M. Lewis, *Redefining the Professional: The Policies and Unregulated Development of Consultant Malpractice Liability*, 72 U. DET. MERCY L. REV. 563 (1995).

226. *See* Invacare Corp. v. Sperry Corp., 612 F. Supp. 448 (N.D. Ohio 1984). *See generally* Sue Ganske Graziano, *Computer Malpractice — A New Tort on the Horizon?*, 17 RUTGERS COMPUTER & TECH. L.J. 177 (1991).

227. Julie Johnson, Comment, *The Sanctuary Crumbles: The Future of Clergy Malpractice in Michigan*, 74 U. DET. MERCY L. REV. 493, 510-11 (1997).

228. Fenton, *supra* note 101, at 57.

negligent hiring and supervision.²²⁹ In *Hester v. Barnett*,²³⁰ the plaintiffs asked the court to apply the tort of clergy malpractice to a Baptist minister who divulged confidential information regarding a family's counseling sessions. However, the court rejected clergy malpractice because of the potential for a redundant remedy.²³¹ The court stated, "To avoid a redundant remedy . . . any functional theory of clergy malpractice needs [to] address incidents of the clergy-communicant relationship not already actionable."²³² Additionally, the court noted that the intentional torts of clergy are already actionable without clashing with the Free Exercise clause of the First Amendment.²³³

The Ohio Supreme Court embraced the *Hester* court's refusal to "creative[ly] use . . . tort law" by granting a redundant remedy.²³⁴ In *Strock v. Pressnell*,²³⁵ a case involving a husband's complaint for clergy malpractice that resulted from an affair between his wife and a Lutheran minister during marriage counseling, the Ohio Supreme Court held that the tort of clergy malpractice applied only if the alleged conduct falls "outside the scope of other recognized torts."²³⁶ Consequently, the court dismissed the clergy malpractice cause of action because the alleged acts were actionable through the realm of intentional tort law.²³⁷ Again, in *Byrd v. Faber*,²³⁸ a case involving nonconsensual sex between a pastor and a parishioner's wife, the Ohio Supreme Court dismissed a claim of clergy malpractice and stated, "To . . . allow recovery for clergy malpractice on the basis of this same conduct would be to grant a redundant remedy"²³⁹ because the complaint failed to articulate any conduct that was not already actionable through existing tort law.²⁴⁰

The problem with overlap is not as simple as either the Ohio or Missouri courts believe. The current torts available for clergy sexual misconduct are not widely accepted by all jurisdictions. Courts have failed to reach a consensus on which torts most adequately provide the victim with a remedy.²⁴¹

229. See *Hester v. Barnett*, 723 S.W.2d 544 (Mo. Ct. App. 1987); *Byrd v. Raber*, 565 N.E.2d 584 (Ohio 1991).

230. 723 S.W.2d 544 (Mo. Ct. App. 1987).

231. *Id.* at 551.

232. *Id.*

233. *Id.* at 552.

234. *Byrd*, 565 N.E.2d at 587.

235. 527 N.E.2d 1235 (Ohio 1988).

236. *Id.* at 1239.

237. *Id.*

238. 565 N.E.2d 584 (Ohio 1991).

239. *Id.* at 587.

240. *Id.*

241. See *supra* Part III.

A court accepting one intentional tort, such as intentional infliction of emotional distress, may choose not to accept another cause of action, leaving the victim with little consistency when preparing for litigation. Moreover, courts reluctantly involve themselves in religious conflicts, a concern most often stated when refusing to accept the tort of clergy malpractice. Therefore, the tort of clergy malpractice would fill a gap in the tort recovery system. With limited application in each jurisdiction, clergy malpractice would circumvent the problems of unclear tort law by establishing one acceptable remedy. Victims would no longer be forced to gamble on which tort a particular jurisdiction will accept. Instead, clergy malpractice would avoid a redundant remedy, while offering litigants a clearer means for recovery.

3. Clergy Malpractice Violates the Fundamental Value of the First Amendment by Infringing on Religious Freedom

The First Amendment to the U.S. Constitution states, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof" ²⁴² The First Amendment comprises the Free Exercise Clause, which protects the ability to exercise one's religious beliefs without government invasion, and the Establishment Clause, which provides that the government will not establish or endorse any particular religion. The Free Exercise Clause "embraces two concepts, — freedom to believe and freedom to act" ²⁴³ and guarantees, "first and foremost, the right to believe and profess whatever religious doctrine one desires." ²⁴⁴ Importantly, the freedom to believe is absolute, but the freedom to act cannot be absolute because "[c]onduct remains subject to regulation for the protection of society." ²⁴⁵

The test used by courts to determine whether an activity violates the First Amendment's Establishment Clause is the *Lemon* test, derived from *Lemon v. Kurtzman*. ²⁴⁶ The *Lemon* test is a three-pronged test. The first prong asks whether the statute or activity that allegedly infringes a religious belief or activity has a secular purpose. ²⁴⁷ The second prong asks whether the statute or activity's primary effect "neither advances nor inhibits religion." ²⁴⁸ Finally, the third prong asks whether the statute or activity promotes "an excessive

242. U.S. CONST. amend. I.

243. *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940).

244. *Employment Div., Dep't of Human Res. v. Smith*, 494 U.S. 872, 877 (1990).

245. *Cantwell*, 310 U.S. at 303-04.

246. 403 U.S. 602 (1971).

247. *Id.* at 612.

248. *Id.*

government entanglement with religion.”²⁴⁹ Courts and legal scholars often criticize the *Lemon* test, and most courts now focus on the third prong alone.²⁵⁰

Courts’ criticisms of clergy malpractice involve the third prong of the *Lemon* test because many believe that determining a reasonable standard of care or examining the hiring, retention, or supervision processes within a religious organization would excessively entangle the courts in religion.²⁵¹ Most courts that refuse to accept clergy malpractice because of First Amendment concerns state that “judicial review of pastoral counseling ‘would require the [c]ourt and the jury to consider the fundamental perspective and approach to counseling inherent in the beliefs and practices’ of the religious denomination[s].”²⁵² Also, many courts maintain that any inquiry into the decision of who should become a cleric or remain one would involve religious doctrine and therefore excessively entangle courts in decisions of religious doctrine or policy.²⁵³

Courts cannot assess the choices within the religious denomination, but clergy malpractice does not require such an in-depth inquiry.²⁵⁴ An inquiry based on clergy malpractice would likely not violate the First Amendment if the questions surround a secular document or separate themselves from the religious doctrine. The Florida Supreme Court nearly accepted a clergy malpractice claim in its analysis in *Malicki v. Doe*. In *Malicki*, the court

249. *Id.* at 613 (quoting *Walz v. Tax Comm’n*, 397 U.S. 664, 674 (1970)).

250. Justice Scalia colorfully analogized the *Lemon* test, stating, “Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again” *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398 (1993) (Scalia, J., concurring). For a discussion about the development of the *Lemon* Test, see Heather S. Savage, Note, *The School Voucher Debate: Recasting the Third Prong of the Lemon Test*, 45 HOW. L.J. 465, 472-83 (2002). For the principal criticisms of the *Lemon* test, see KATHLEEN M. SULLIVAN & GERALD GUNTHER, *FIRST AMENDMENT LAW* 535 (2d ed. 2003).

251. *Leary v. Geoghan*, No. 990371, 2000 WL 1473579, at *1 (Mass. Super. Ct. June 28, 2000).

252. *Lann v. Davis*, 34,892 (La. App. 2 Cir. 8/22/01), 793 So. 2d 463, 465 (quoting *Schmidt v. Bishop*, 779 F. Supp. 321, 328 (S.D.N.Y. 1991)).

253. *Isely v. Capuchin Province*, 880 F. Supp. 1138, 1150 (E.D. Mich. 1995); see also *Lann*, 34,892 (La. App. 2 Cir. 8/22/01), 793 So. 2d at 465 (stating that judicial review of pastoral counseling would violate the separation of church and state); *Gibson v. Brewer*, 952 S.W.2d 239, 247 (Mo. 1991) (stating “judicial inquiry into hiring, ordaining, and retaining clergy would result in an endorsement of religion, by approving one model of church hiring, ordination, and retention of clergy”); *Langford v. Roman Catholic Diocese*, 705 N.Y.S.2d 661, 662 (N.Y. App. Div. 2000) (stating that “any attempt to define the duty of care owed by a member of the clergy to a parishioner fosters excessive entanglement with religion”).

254. See Marci Hamilton, *The Catholic Church, the Insurance Carriers, and Why the First Amendment’s Religious Freedom Guarantees Provide No Defense in the Clergy Abuse Cases*, at <http://writ.news.findlaw.com/hamilton/20030116.html> (last visited July 15, 2004).

examined negligent hiring and supervision claims resulting from a priest's sexual molestation and assault.²⁵⁵ The Florida Supreme Court held that the First Amendment "does not provide a shield behind which a church may avoid liability for harm caused to an adult and a child parishioner arising from the alleged sexual assault or battery by one of its clergy."²⁵⁶ In holding that the church could not escape liability, the court stated, "[J]ust as the State may prevent a church from offering human sacrifices, it may protect its children against injuries caused by pedophiles by authorizing civil damages against a church that knowingly . . . creates a situation in which such injuries are likely to occur."²⁵⁷ The court, understanding the gravity of sexual misconduct and abuse, held that the First Amendment could not insulate churches from liability.

Religious institutions attempt to shield themselves from liability by hiding behind the First Amendment argument that the tort of clergy malpractice would violate the separation of church and state.²⁵⁸ However, courts can avoid the potential religious entanglement by following *Malicki* or by applying one of three other options for analysis.

First, a court may apply the "neutral principles method, which allows the adjudication of religious institutional disputes" when neutral principles of law can resolve the argument.²⁵⁹ That is, courts can apply legal standards or rules that are regularly applied without regard to the fact that the case involves a particular religious institution or doctrine.²⁶⁰ The neutral principles method most often applies in property disputes involving religious institutions.²⁶¹ According to the U.S. Supreme Court, the neutral principles method "relies exclusively on objective, well-established concepts of . . . law familiar to lawyers and judges [and] promises to free civil courts completely from entanglement in questions of religious doctrine, polity, and practice."²⁶² The Supreme Court initially approved the neutral principles method for intrachurch property disputes;²⁶³ however, lower courts have extended the application to tort actions against religious institutions.²⁶⁴ The First

255. *Malicki v. Doe*, 814 So. 2d 347, 352 (Fla. 2002).

256. *Id.* at 351.

257. *Id.* at 360 (quoting *Doe v. Dorsey*, 683 So. 2d 614, 617 (Fla. Dist. Ct. App. 1996)).

258. *Lann*, 34,892 (La. App. 2 Cir. 8/22/01), 793 So.2d at 465 (stating that judicial review of pastoral counseling would cause inquiry into religious fundamentals and violate the First Amendment's separation of church and state).

259. *Idleman*, *supra* note 198, at 259.

260. *Id.*

261. *Jones v. Wolf*, 443 U.S. 595 (1979).

262. *Id.* at 603.

263. *See id.* at 604.

264. *See Martinelli v. Bridgeport Roman Catholic Diocesan Corp.*, 10 F. Supp. 2d 138, 148

Amendment defense becomes "frivolous"²⁶⁵ when courts can resolve disputes with neutral principles of tort law.

Second, courts can deem the question or conduct nonreligious, avoiding the First Amendment problem altogether.²⁶⁶ By defining the inquiry as nonreligious, courts take the matter out of the First Amendment realm and eliminate the subsequent entanglement of church and state.²⁶⁷ The Missouri Court of Appeals followed this approach, stating, "Tort actions against religious groups or persons are not offensive to the First Amendment if based on purely secular activities, unrelated to their religious functions"²⁶⁸ The court allowed the cause of action "if the alleged wrongdoing was clearly outside the tenets of the religion, notwithstanding its religious pretext."²⁶⁹ However, both this approach and the neutral principles method involve a "substantial risk that judges will erroneously recategorize matters as nonreligious simply to subject them to adjudication."²⁷⁰ The risk of recategorization appears in circumstances where the alleged wrongdoing may seem clearly beyond the tenets of the religion, but a determination of whether the conduct accords with the religion can involve "judicial interpretation of religious doctrine."²⁷¹

Finally, courts can admit that the conduct or counseling is religious but determine that the religious nature is inconsequential and therefore not excessive nor impermissible for First Amendment purposes.²⁷² The New Jersey Supreme Court applied this approach in a breach of contract cause of action, stating, "Just as the existence of a tangential secular issue does not authorize civil courts to override primarily doctrinal determinations by authorities in hierarchical religions, inconsequential doctrinal issues that were irrelevant to the employment relationship do not preclude doctrinally-objective enforcement of a secular interest pursuant to a secular agreement."²⁷³

(D. Conn. 1998) (holding that a breach of fiduciary duty claim "was capable of being resolved under Connecticut law using neutral principles"); *Smith v. O'Connell*, 986 F. Supp. 73 (D.R.I. 1997) (applying the neutral principles method); *Isely v. Capuchin Province*, 880 F. Supp. 1138 (E.D. Mich. 1995) (applying neutral principles method to negligent supervision).

265. *Strock v. Pressnell*, 527 N.E.2d 1235, 1239 (Ohio 1988).

266. *Idleman*, *supra* note 198, at 261.

267. *Id.*

268. *H.R.B. v. J.L.G.*, 913 S.W.2d 92, 98 (Mo. Ct. App. 1995).

269. *Id.*

270. *Idleman*, *supra* note 198, at 262.

271. *Id.*

272. *Id.* at 264.

273. *Welter v. Seton Hall Univ.*, 608 A.2d 206, 217 (N.J. 1992) (citation omitted).

Again, there still exists the concern that judges must determine what amount of religion is inconsequential or minor.²⁷⁴

Courts may also create exceptions to avoid adjudicatory entanglement with religion, thereby obscuring any emphasis on religion.²⁷⁵ There are at least three exceptions that may apply. First, some courts distinguish between “conduct affecting persons sufficiently affiliated with the religious institution and conduct affecting third parties.”²⁷⁶ This distinction allows courts to hold that a church has no power to regulate or adjudicate conduct involving third parties.²⁷⁷ Second, some courts draw lines “between conduct that occurs within the spatial bounds or authoritative domain of the religious institution and conduct that occurs outside of those parameters.”²⁷⁸ The attempt to separate the religious and the secular based on where an alleged wrongdoing occurred could remove First Amendment concerns and allow the court to accept the cause of action.²⁷⁹ Third, some courts have found that prohibition based on the First Amendment is inapplicable in intentional tort cases.²⁸⁰ The purpose behind such a holding remains that clergy and churches cannot be insulated from liability for their own intentional wrongdoings.²⁸¹ These exceptions remove any First Amendment boundaries and strengthen the availability of existing remedies in the religious context.

274. Idleman, *supra* note 198, at 264.

275. *Id.*

276. *Id.* at 264-65.

277. See *Konkle v. Henson*, 672 N.E.2d 450, 455 n.6 (Ind. Ct. App. 1996) (“The limits on the court’s power are confined to intra-church disputes.”); *Hadnot v. Shaw*, 1992 OK 21, ¶30, 826 P.2d 978, 988 (barring judicial scrutiny into ecclesiastical jurisdiction but not extending the bar to nonmembers because “the church has no power over those who live outside of the spiritual community”).

278. Idleman, *supra* note 198, at 265.

279. See *Hayden v. Schulte*, 97-0422 (La. App. 4 Cir. 10/29/97), 701 So. 2d 1354, 1356 (allowing a defamation action against a church because the defamatory statements were “intentionally disseminated outside the church to news organizations”); *Schoenhals v. Mains*, 504 N.W.2d 233, 236 (Minn. Ct. App. 1993) (in a defamation action, the court stated, “[W]e believe that the fact that the letter was disseminated only to other members of the Church strengthens the conclusion that [the] statements involved and were limited to Church discipline.”).

280. Idleman, *supra* note 198, at 265-66.

281. See *Hester v. Barnett*, 723 S.W.2d 544, 552 (Mo. Ct. App. 1987) (finding intentional torts by a cleric are actionable, even though they are “incidents of religious practice and belief”); *F.G. v. MacDonell*, 696 A.2d 697, 702 (N.J. 1997) (recognizing intentional torts against the clergy and listing other courts who have allowed intentional torts against the clergy).

V. Changing the Court's Mind: Accepting and Applying the Tort of Clergy Malpractice

As discussed in Part IV, clergy malpractice consists of five elements necessary to establish this tort: (1) failure to exercise the degree of care and skill unique to practitioners of divinity (2) in a parishioner's relationship based on counseling or conduct (3) by outrageous conduct that (4) causes a definable injury to the parishioner (5) who relied upon the cleric's advice, conduct, or counseling.²⁸² For courts to accept the tort of clergy malpractice, there must be a clear definition with a precise application. The above definition provides that precision to allow for application in appropriate contexts.

A. Accepting the New Tort of Clergy Malpractice

The narrow construction of clergy malpractice sets forth an actionable tort, but courts must also accept the new application as a positive expansion of tort liability. For legal change to occur in the area of clergy malpractice, an internal or external stimulus, such as "the institution of litigation, a proposal of legislation, a shift in public attitudes, pressure from the media, the lobbying of a cause, and the like," must engage the legal or political processes.²⁸³ These stimuli are the cultural factors that effectuate change in society.²⁸⁴ Three factors weigh in favor of accepting the tort of clergy malpractice as beneficial to society: (1) the shift in public attitudes demonstrates the need for change in the accountability of religious institutions and clergy; (2) increasing litigation stimulates change and evolution in tort law and reveals the need for clergy malpractice; and (3) the media and lobbying groups pressure the courts for answers.

1. The Shift in Public Attitudes Demonstrates the Need for Accountability of Religious Institutions and the Promotion of Safety in the Church

Public sympathy for victims of clergy abuse and related opposition toward clergy who commit such acts will influence courts to adopt the tort of clergy malpractice. Increasingly, the public is more sympathetic to victims and more antipathetic toward offending clergy and churches that cover up such wrongs.²⁸⁵ The violation of trust and confidence occurring in religious

282. See *supra* Part IV.B.

283. Idleman, *supra* note 198, at 240.

284. *Id.*

285. *Id.* at 243.

institutions contravenes the general goals of safety and protection. Safety is of the utmost importance in society, which favors protecting innocent children who have been abused over predatory clergy who prey on those innocent children.²⁸⁶

The Boston Globe and Boston's WBZ-TV conducted a survey of 800 Catholics in the Boston Diocese. Thirty-one percent of the polled Catholics said that the sex abuse scandal had caused them to donate less money to the church than prior to the break of the priest sexual abuse scandal.²⁸⁷ Sixty-four percent of the participants believed that the Catholic Church cared more about protecting the priests than the people who were sexually abused by the priests.²⁸⁸ Finally, 81% of the Catholics polled believed that the Church had tried to cover up cases of sexual abuse of children by priests.²⁸⁹ These statistics clearly show that Catholics are skeptical of the Church's ability to assist victims and believe that the Church is more concerned with the priests and its own image than the safety and well-being of the children and the parishioners.

Today's society has a heightened awareness of victim status, and the public believes that the Church should not mistreat victims.²⁹⁰ Sympathy towards victims could lead to greater assistance and better remedies for recovery by pressuring the judiciary and the legislature to implement better recovery methods. By allowing claims of clergy malpractice to stand, courts would serve public policy and promote the safety of children over the harboring of criminals. Clergy malpractice simply gives innocent victims recourse for their wrongs.²⁹¹

2. Increasing Litigation Stimulates Change and Evolution in Tort Law and Reveals the Need for the Tort of Clergy Malpractice

One of the most obvious stimuli motivating change in tort law and promoting the acceptance of clergy malpractice is the increase in civil litigation. Approximately fifteen years ago, a case involving pastoral

286. Wood, *supra* note 77, at 1050.

287. Michael Paulson, *Most Catholics in Poll Want a Resignation*, BOSTON GLOBE, Apr. 17, 2002, at A1, available at http://www.boston.com/globe/spotlight/abuse/stories/041702_catholics_poll.htm.

288. *Id.*

289. *Id.*

290. Idleman, *supra* note 198, at 243.

291. Oftentimes clergy offenders are not punished in the criminal justice system because of statute of limitations problems or failure of the victims to come forward quickly, leaving the civil remedy as the only option for justice. See O'Reilly & Strasser, *supra* note 20, at 68-69 (discussing the effect of statutes of limitations and other statutes on liability in clergy sexual misconduct cases).

counselors failing to refer a parishioner for additional treatment introduced the tort of clergy malpractice.²⁹² Since then, tort actions for clergy impropriety appear to be on the rise.²⁹³ This increase alone is significant because it shows both an increased willingness to charge religious institutions and a desire to change the face of tort law.

Additionally, increased litigation will encourage courts to accept clergy malpractice as a tort for two reasons. First, increased litigation places the claims for liability and unreasonableness of conduct before the legal system for some determination as to their merit, either by judges or by juries.²⁹⁴ Second, a victim's willingness to bring suit against his clergy and church may prompt other victims to bring suit.²⁹⁵ With a greater willingness to test the system and seek recovery, victims frequently will litigate their claims and pressure courts to develop new theories of recovery.

Increased litigation offers the judicial community multiple opportunities to examine the propriety of clergy malpractice. Already courts are separating the religious context from the conduct in other torts such as negligent hiring and supervision and accepting theories of liability against churches and clerics.²⁹⁶ The more courts review clergy malpractice, the more likely they will also accept the clergy malpractice standard.

3. *The Media and Lobbying Groups Pressure Courts for Answers*

Clergy impropriety, sexual misconduct, and sexual abuse received a rash of media coverage across the nation.²⁹⁷ Accounts of clergy misconduct are no longer hidden in the religion section of major newspapers; these accounts fall squarely on the front pages of the nation's leading newspapers. *The Boston Globe* alone published more than 600 articles and opinion pieces from January 2002 to September 2002 dealing with clergy misconduct.²⁹⁸

Increased media pressure may have two effects on the imposition of clergy malpractice in modern tort law.²⁹⁹ First, the media may spur potential

292. *Nally v. Grace Cmty. Church of the Valley*, 763 P.2d 948 (Cal. 1988).

293. *Idleman*, *supra* note 198, at 240; *see also* McMENAMIN, *supra* note 115, at 5 ("There is an epidemic of clergy malpractice claims."); *Arnold*, *supra* note 9, at 26 (noting an outpouring or "epidemic" of claims against the church and clergy).

294. *Idleman*, *supra* note 198, at 241-42.

295. *Id.* at 242.

296. *Malicki v. Doe*, 814 So. 2d 347, 360 (Fla. 2002).

297. *See supra* note 27 and accompanying text.

298. *Boston Globe*, *The Boston Globe Spotlight on Abuse in the Catholic Church*, at <http://www.boston.com/globe/spotlight/abuse> (last visited July 15, 2004).

299. Additionally, media and lobbying pressure could result in legislation. For example, Minnesota has extended counseling liability to clergy. MINN. STAT. § 148B.60 (1998). In Minnesota's statute regarding unlicensed mental health professionals, the State defines an

plaintiffs to file suit against the clergy and churches,³⁰⁰ which will lead to increased litigation and its benefits.³⁰¹ Second, increased media coverage may “put pressure on the courts and the churches to do what is necessary to alter pastoral conduct.”³⁰² This media pressure can either be a direct influence on judges and juries trying cases involving clergy impropriety or an indirect influence on public attitude, which will, in turn, affect judicial decision making.³⁰³ Either type of influence will greatly increase the acceptance of clergy malpractice as the media and the people choose to promote the tort of clergy malpractice.

B. Applying the Tort of Clergy Malpractice to Cardinal Bernard Law

To understand the application of the tort of clergy malpractice, consider the following facts about Cardinal Bernard Law’s response to clergy sexual

“unlicensed mental health practitioner” to include “clergy who are providing mental health services that are equivalent to those defined [in the previous section of the statute].” *Id.* § 148B.60(3)(3). The statute exempts clergy who are simply providing “pastoral services” in the context of their vocation. *Id.* § 148B.60(4).

The Supreme Court of Minnesota reviewed the statute in its application to a parishioner who alleged that a minister “engaged in improprieties in counseling” the parishioner’s wife. *Odenthal v. Minn. Conference of Seventh-day Adventists*, 649 N.W.2d 426, 430 (Minn. 2002). The court held that the statute’s application to clergy did not “alter or impinge upon the religious character” of the relationship.” *Id.* at 441 (quoting *Hill-Murray Fed’n of Teachers v. Hill-Murray High Sch.*, 487 N.W.2d 857, 864 (Minn. 1992)). Additionally, the court held that the statute still allowed for spiritual counseling and guidance regarding doctrinal teachings without concern for malpractice claims. *Id.* Therefore, the statute provides a standard of acceptable conduct for all mental health professionals that allows for the inclusion of spiritual or religious aspects and still holds the professional to a degree of care without burdening the exercise of religion. *Id.* at 442.

The Minnesota legislature extended a malpractice standard to clergy acting as mental health professionals. This statute presents a valid step to incorporating clergy malpractice and the properly applying the tort. Legislation similar to Minnesota’s statute that includes clergy members in the classification of unlicensed mental health professionals is the first step to legislation that provides for recovery in all counseling and mentoring situations. The statute must provide a claim for recovery that falls within the definable malpractice standard while still being easily applicable. Minnesota’s statute does this but subsequent statutes should more precisely define the clergy’s role as an unlicensed professional and provide additional clarification.

300. During the first months of the 2002 breaking scandal in the Boston Archdiocese of the Catholic Church, more than 200 victims of sexual abuse in the Boston area contacted *The Boston Globe* to tell their stories. BETRAYAL, *supra* note 1, at 80. For many of these victims, the reporters were the first to hear of the shame and guilt they had lived with for years. *Id.*

301. Idleman, *supra* note 198, at 242.

302. *Id.* (quoting Fain, *supra* note 165, at 118).

303. *Id.*

misconduct within the Boston Archdiocese.³⁰⁴ Much of the controversy surrounding Cardinal Law relates to his cover-up of pedophilic priests. Cardinal Law transferred to the Archdiocese of Boston in March 1984.³⁰⁵ Father John Geoghan was a priest within the Archdiocese while Cardinal Law oversaw the Boston-area parishes.³⁰⁶ Church officials knew about Geoghan's pedophilia, but shuffled him from parish to parish to avoid public scandal.³⁰⁷ Between 1980 and 1990, Geoghan received treatment for his sexual disorder but continued to receive clean bills of health.³⁰⁸ In September 1984, less than six months into Cardinal Law's tenure as Archbishop, a parishioner in the Boston Archdiocese wrote Cardinal Law, informing him that Father Geoghan had molested seven boys in her extended family.³⁰⁹ She wrote,

There is a priest at St. Brendan's in Dorchester who has been known in the past to molest boys. The Cardinal [Medeiros] had sent father for treatments, and after returning to parish duties he maintained a low profile for quite a while. Lately, however, he has been seen in the company of many boys, to the extent to dropping them off at their homes as late as 9:30 p.m.³¹⁰

Cardinal Law's response to the letter was simply stated, without emotion, "The matter of your concern is being investigated and appropriate pastoral decisions will be made both for the priest and God's people."³¹¹ After Father Geoghan received yet another doctor's approval to send him back to the ministry,³¹² Cardinal Law sent Geoghan from St. Brendan's in Boston to St. Julia's in Weston, Massachusetts.³¹³ Upon assignment to St. Julia's, Bishop John M. D'Arcy wrote Cardinal Law, questioning the assignment because of Geoghan's "history of homosexual involvement with young boys" and

304. For the purposes of the argument, the facts will be hypothetically applied as if the Cardinal were acting under the Charter and the Norms. Additionally, the application will only consider Cardinal Law's response to Father John Geoghan, not the countless other priests under his watch.

305. Deposition of Cardinal Law at 13, *Leary v. Geoghan* (Suffolk County Super. Ct. May 8, 2002) (No. 99-0371), http://www.boston.com/globe/spotlight/abuse/geoghan/law_deposition_print.htm.

306. BETRAYAL, *supra* note 1, at 26.

307. *Id.* at 23.

308. *Id.* at 26.

309. *Id.* at 217.

310. *Id.* at 31.

311. *Id.* at 217.

312. *Id.* at 218. Oftentimes, the letters allowing Father Geoghan to return to a parish for full duties came from Geoghan's family doctor and friend. *Id.*

313. *Id.* at 32.

suggesting Father Geoghan be limited to weekend work while receiving therapy.³¹⁴ Cardinal Law permitted Father Geoghan to remain at St. Julia's and during his work there, Geoghan molested many more children.³¹⁵ Despite continued complaints by parishioners and a physician's concerns about Geoghan's work with children,³¹⁶ Cardinal Law did not remove Father Geoghan from active parish duties until December 1994, when he placed Geoghan on administrative leave.³¹⁷ Following Geoghan's administrative leave, Cardinal Law granted Geoghan sick leave and early retirement before finally dismissing him from the priesthood in February 1998.³¹⁸

First, to submit a clergy malpractice claim against Cardinal Law, he must have failed to exercise the degree of care and skill unique to practitioners of divinity.³¹⁹ Thus, there must be a degree of care and skill inherent in Cardinal Law's position. This degree of care and skill can be derived from the secular aspects of the Roman Catholic Church. As evidenced by the Church's Charter and the Norms, the Roman Catholic Church has developed standards of decency in its order.³²⁰ The Charter and the Norms do not specifically delve into canon law or the requirements of a priest but instead focus on the church's secular response to the situation. By focusing on the secular document of a religious institution, the standard is set as one for divinity practitioners. Next, he must have failed to exercise the standard of care through a breach.³²¹ Such failure comes from directly violating the secular document, and therefore does not entangle itself into doctrinal interpretation. For example, a bishop's standard of care would be to uphold and enforce the Charter and the Norms. When faced with allegations of sexual abuse, the bishop should apply proper precautionary measures, including removal of the accused from the sacred ministry, prohibition of residency in a given place, and prohibition of public participation in certain sacraments.³²² Also, when

314. *Id.* at 219.

315. *Id.* at 35. More than thirty claims have been filed against Geoghan for actions during his time at St. Julia's parish. *Id.*

316. *Id.* at 221. Notes from Bishop Robert J. Banks' conversation with Dr. Brennan, one of Father Geoghan's treating physicians, state that Dr. Brennan was concerned about Father Geoghan's interactions with children and thought the Archdiocese "better clip his wings before there is an explosion." *Id.*

317. *Id.* at 224.

318. *Id.* at 229.

319. *See supra* Part IV.B, IV.C.

320. Note, the Charter and the Norms were developed after Cardinal Bernard Law committed the acts considered here. For purposes of illustrating the use of the tort of clergy malpractice, the Charter and the Norms are used retroactively as if they were in effect at the time of the previously described events.

321. *See supra* Part IV.B, IV.D.

322. CHARTER, *supra* note 39, at 8. Although the measures include specific religious duties,

transferring a priest or deacon from one residence to another, the bishop should forward all information indicating the priest's danger to children and young people.³²³ As shown by the facts stated above, Cardinal Law failed to promptly remove Father Geoghan and instead shuffled him from one parish to the next without adequately informing the subsequent parishes of the danger Geoghan posed.

The second element of the tort of clergy malpractice requires that the offense relate to a parishioner's relationship based on counseling or conduct.³²⁴ Therefore the offense must be tied to the cleric's duties and relationship to a specific parishioner. Holding the cleric to a standard encompassing the entire congregation would be too broad. In that instance, any deviation from a parishioner's perceived expectations would give rise to a claim of clergy malpractice. However, by focusing on the relationship between a parishioner and a cleric in a counseling environment, courts can narrow the scope of the tort. A counseling relationship, however, need not be formal and should include mentoring, counseling, and educational situations. Oftentimes clerics mentor in an informal manner. Because of the sensitivity of religion, these situations are similar to counseling and should be considered as such. Applying such a standard to Cardinal Law, the offense — the failure to properly remove and inform parishioners about Father Geoghan — related to particular parishioners — those who were subsequently abused by Geoghan. Cardinal Law's failure to properly inform the subsequent parishes placed additional children at risk.

The third element of the tort of clergy malpractice is that the cause of action must be based on outrageous conduct.³²⁵ Claiming that liability should result from any conduct stemming from a counseling relationship between a cleric and parishioner would be too broad of an assertion. The conduct must be outrageous conduct, which is "[c]onduct so extreme that it exceeds all reasonable bounds of human decency."³²⁶ Examples of outrageous conduct could include sexual misconduct, sexual exploitation, sexual harassment, breach of cleric confidentiality, or breach of the church's secular policy regarding sexual misconduct or exploitation. In the facts surrounding Cardinal Law's continued shuffling of Father Geoghan, Law's failure to follow the transfer requirements by not fully disclosing Geoghan's medical history and instances of recidivism surely qualifies as outrageous. Cardinal

the procedure itself does not delve into religious doctrine, making the procedure more secular than religious.

323. *Id.* at 12.

324. *See supra* Part IV.B.

325. *See supra* Part IV.B.

326. BLACK'S LAW DICTIONARY 292 (7th ed. 1999).

Law placed many young children in harm's way by allowing Geoghan to continue his ministry without supervision.

The fourth element of the tort of clergy malpractice requires that the conduct stemming from the relationship with the cleric must cause a definable physical injury in the parishioner.³²⁷ A bodily injury is "[p]hysical damage to a person's body."³²⁸ Parishioners cannot recover for injuries that lack fact or substance. Mere injury to reputation would be insufficient to establish a cause of action under clergy malpractice. This requirement narrows the class of victims to those who actually were harmed, either physically or emotionally. Sexual misconduct and sexual exploitation are two prime examples of how clergy malpractice could result in a physical and/or emotional injury, and medical testimony could prove the injury. However, proving injury might be more difficult in cases involving breaches of cleric confidentiality. For a case such as Cardinal Law's, the definable physical injury stems from the abuse at the hands of a known pedophile. By transferring Father Geoghan, rather than removing him from the ministry, Cardinal Law allowed Father Geoghan full access to unsuspecting children.

Finally, the plaintiff parishioner whose injury is at issue must have relied upon the cleric's counseling, advice, or conduct.³²⁹ Counseling or conduct without reliance is insufficient to establish a claim for clergy malpractice. In cases of confidentiality and counseling, the parishioner would have to show that he took some action based upon the cleric's conduct or counseling. In sexual misconduct, abuse, or exploitation cases, the parishioner could meet this requirement by showing that he developed a relationship with the cleric and accepted his counseling and/or conduct as essential to that relationship. For a case against Cardinal Law, to satisfy the final element of the tort of clergy malpractice, the plaintiff-parishioner would have to prove that he relied upon Cardinal Law's transfer as a sign that Father Geoghan was a good priest or a safe priest. Some action, relying on Cardinal Law's constant support of Geoghan, would have to be taken to prove the final element.

The foundation of the tort of clergy malpractice creates a narrowly applicable tort. The plaintiff-parishioner must prove a *prima facie* case based on a specific standard of care, breach, and reliance on his part. By focusing the definition, the tort of clergy malpractice does not subject the church to unrestrained liability. However, the tort does allow victims of misconduct and exploitation to remedy their lives.

327. See *supra* Part IV.B.

328. BLACK'S LAW DICTIONARY 789 (7th ed. 1999).

329. See *supra* Part IV.B.

VI. Conclusion

The tort of clergy malpractice fills a gap in modern tort law. With numerous jurisdictions accepting and rejecting different theories of liability, tort law needs a uniform approach for victims of clergy sexual misconduct. Even though no court has yet accepted the tort,³³⁰ the tort of clergy malpractice would establish a standardized method of recovery. Battery, negligent or intentional infliction of emotional distress, breach of fiduciary duty, respondeat superior, and negligent hiring and supervision fail to provide an adequate remedy in a context of clergy cases. The tort of clergy malpractice satisfies that void without violating the First Amendment when approached from a secular standard of care. By defining the cleric's standard of care through the secular documents establishing personnel policies, the court can avoid excessive entanglement and judge the conduct based on actions, not religious dogma. With public outcry about the religious scandal and public support to remedy the wrongs of the past, the courts can offer victims of abuse and misconduct a chance to recover for the pain and suffering that continues today.

Emily C. Short

330. *Dausch v. Rykse*, 52 F.3d 1425, 1432 (7th Cir. 1994).